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In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DECATURVILLE SPORTSWEAR CO., INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	4
A. The prior unfair labor practice proceeding	4
B. The contempt proceeding	5
1. The findings and conclusions of the Special Master	5
2. The decision of the court of appeals	11
Reasons for granting the writ	12
Conclusion	20
Appendix A	1a
Appendix B	5a
Appendix C	7a
Appendix D	88a
Appendix E	100a
Appendix F	102a

CITATIONS

Cases:

Albermarle Paper Co. v. *Moody*, No. 74-389, decided June 25, 1975	19
Amalgamated Utility Workers v. *Consolidated Edison Co.*, 309 U.S. 261	18

Cases—Continued

	Page
General Drivers & Helpers Union, Local 662 v. *National Labor Relations Board*, 302 F. 2d 908, certiorari denied *sub nom. Rice Lake Creamery Co.* v. *General Drivers & Helpers Union, Local No. 662*, 371 U.S. 827	15
Hugh H. Wilson Corp. v. *National Labor Relations Board*, 414 F. 2d 1345, certiorari denied, 397 U.S. 935	15
Maggio v. *Zeitz*, 333 U.S. 56	20
Mastro Plastics Corp. v. *National Labor Relations Board*, 350 U.S. 270	17
National Labor Relations Board v. *Adam Loos Boiler Works Co.*, 435 F. 2d 707	14
National Labor Relations Board v. *American Mfg. Co. of Texas*, 351 F. 2d 74	14
National Labor Relations Board v. *Ayer Lar Sanitarium*, 436 F. 2d 45	14
National Labor Relations Board v. *Cast Optics Corp.*, 458 F. 2d 398, certiorari denied, 409 U.S. 850	15
National Labor Relations Board v. *Duncan Foundry and Machine Workes, Inc.*, 435 F. 2d 612	16
National Labor Relations Board v. *Electric Steam Radiator Corp.*, 321 F. 2d 733	14
National Labor Relations Board v. *Elias Bros. Restaurants*, 496 F. 2d 1165	14, 15
National Labor Relations Board v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, certiorari denied, 375 U.S. 834	15
National Labor Relations Board v. *Fleetwood Trailer Co.*, 389 U.S. 375	16-17

Cases—Continued

	Page
National Labor Relations Board v. *Frick Co.*, 397 F. 2d 956	16
National Labor Relations Board v. *Globe Wireless*, 193 F. 2d 748	16
National Labor Relations Board v. *Hanes Hosiery Division*, 413 F. 2d 457	14, 15
National Labor Relations Board v. *Hopwood Retinning Co.*, 104 F. 2d 302	18
National Labor Relations Board v. *International Van Lines*, 409 U.S. 48	16
National Labor Relations Board v. *John S. Swift Co.*, 277 F. 2d 641	16
National Labor Relations Board v. *Local 282, Teamsters*, 412 F. 2d 334, certiorari denied, 396 U.S. 1038	14
National Labor Relations Board v. *Louisville Chair Co.*, 385 F. 2d 922, certiorari denied, 390 U.S. 1013	15
National Labor Relations Board v. *Mayrath Co.*, 319 F. 2d 424	16
National Labor Relations Board v. *Mexia Textile Mills*, 339 U.S. 563	18
National Labor Relations Board v. *Princeton Inn Co.*, 424 F. 2d 264	14
National Labor Relations Board v. *Roberts & Sons, Inc.*, 451 F. 2d 941	14
National Labor Relations Board v. *Sea-Land Service Inc.*, 356 F. 2d 955, certiorari denied, 385 U.S. 900	15
National Labor Relations Board v. *Southwestern Porcelain Steel Corp.*, 317 F. 2d 527	16
National Labor Relations Board v. *Tom Wood Pontiac, Inc.*, 447 F. 2d 383	14

Cases—Continued

	Page
National Labor Relations Board v. *Warren Co.*, 350 U.S. 107, reversing 214 F. 2d 481	12, 13, 17, 18
National Labor Relations Board v. *Washington Aluminum Co.*, 370 U.S. 9	15, 17
National Labor Relations Board v. *West Side Carpet Cleaning Co.*, 329 F. 2d 758	14
National Labor Relaitons Board v. *Whitin Machine Works*, 204 F. 2d 883	14
National Labor Relations Board v. *Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898, modified on other grounds, 356 U.S. 342	15
Parker v. *United States*, 153 F. 2d 66	18
Phillips v. *Martin Marietta Corp.*, 400 U.S. 542	15
Ridgely Mfg. Co. v. *National Labor Relations Board*, 509 F. 2d 185	16
S. A. Healy Co. v. *National Labor Relations Board*, 435 F. 2d 314	14-15
San Antonio Machine & Supply Corp. v. *National Labor Relations Board*, 363 F. 2d 633	15
Singer Co. v. *National Labor Relations Board*, 429 F. 2d 172	14
Union Tool Co. v. *Wilson*, 259 U.S. 107	19
Wirtz v. *Ocala Gas Co.*, 336 F. 2d 236	18

Statute:

	Page
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*)	2

Cases—Continued

	Page
Section 7	2, 16
Section 8(a)(1)	3, 4
Section 8(a)(3)	3, 4
Section 10(e)	3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit dismissing, in substantial part, the Board's petition for civil contempt.

OPINIONS BELOW

The opinion of the court of appeals in the instant contempt proceeding (Pet. App. A, pp. 1a-4a) is not yet officially reported. The findings and conclusions of the Special Master, which were adopted by the court of appeals, are set out in two memoranda and

reproduced, *infra* (Pet. App. C, pp. 7a-87a). The opinion of the court of appeals (Pet. App. D, pp. 88a-99a), pursuant to which the decree enforcing the Board's order was entered (Pet. App. E, pp. 100a-101a), is reported at 406 F. 2d 886. The underlying decision and order of the Board (Pet. App. F, pp. 102a-124a) are reported at 166 NLRB 703.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 5a-6a) was entered on May 23, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the requirement that civil contempt must be established by "clear and convincing evidence" permits a court of appeals in a contempt proceeding to apply to established facts substantive criteria different from those which it would have applied in a proceeding to enforce the Board's order.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the pur-

> pose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.
>
> * * * * *
>
> Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency,

shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

STATEMENT

A. The Prior Unfair Labor Practice Proceeding

In the original unfair labor practice case, the Board found that Marlene Industries Corporation and its manufacturing subsidiaries[1] (referred to jointly as "the Company")—in an effort to combat an organizational campaign at their seven plants by the International Ladies' Garment Workers' Union, AFL-CIO (the Union)—engaged in numerous acts of restraint and coercion in violation of Section 8(a)(1) of the Act, and discriminatorily discharged or refused to recall seventeen named employees in violation of Section 8(a)(3) and (1) of the Act (Pet. App. D, pp. 92a-95a). The Board ordered the Company to cease and desist from the unfair labor practices found and from in

> any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, * * * to join or assist * * * [the Union] or any other labor organization, * * * and to engage in other concerted activities for the purpose of collective bargaining

[1] Decaturville Sportswear Co. is one of those subsidiaries.

> or other mutual aid or protection, and to refrain from any or all such activities [Pet. App. F, p. 116a].

The Board also ordered the Company, *inter alia*, to reinstate with backpay the seventeen discriminatees, to give the Union access to plant bulletin boards for a year, and to provide an opportunity for union organizers to communicate with employees during non-working time in specified non-working areas of the plants for six months (*id.* at 116a-118a).

The court of appeals found that substantial evidence supported the Board's findings and enforced its order in all relevant respects (Pet. App. D, pp. 88a-99a; Pet. App. E, pp. 100a-101a).[2]

B. The Contempt Proceeding

1. *The findings and conclusions of the Special Master*

Thereafter, alleging that the Company had failed to comply with the enforcement decree, the Board petitioned the court of appeals to adjudge the Company in civil contempt. The court referred the matter to a Special Master, the Honorable Harry W. Wellford, United States District Judge for the Western District of Tennessee. After a hearing, the Special Master issued two memoranda which, in relevant

[2] Only the provision of the order directing the Company to furnish the Union with employee names and addresses was denied enforcement (Pet. App. D, pp. 98a-99a; Pet. App. E, pp. 100a-101a).

part, contained the following findings and conclusions: [3]

a. In the spring of 1969, as a result of enforcement of the Board's order, which, *inter alia*, afforded the Union access to the Company's parking lots and bulletin boards, the Union, which had been attempting to organize the Company's employees since 1965, intensified its organizational efforts (Pet. App. C, p. 12a). When the Union's renewed campaign began, some of the pressers at the Decaturville plant became active on behalf of the Union within the plant, discussing organization during lunch and break periods during 1969 and 1970 (*id.* at 36a-37a). On June 23, 1970, the Company adopted a work change in the pressing department that in effect required pressers, who were on a piece rate, to perform at no additional pay the functions of quality control inspectors on their own work (*id.* at 33a-36a). Employee Nelson Rushing, the senior man in the pressing department, and a number of other pressers protested this change to their supervisor (*ibid.*).

Shortly thereafter, the supervisor informed Rushing and the other pressers that Plant Manager Anderson wanted to see them in his office (Pet. App. C, p. 35a). One of the pressers, Hancock, stated that he did not want to go to the office because he had been there before and had accomplished nothing. Hancock proposed instead that Anderson come and discuss the issue with the pressers (*id.* at 35a-36a). The supervisor left and most of the pressers went to the lunchroom on their break. While the break was still in progress, Anderson entered the lunchroom accompanied by a supervisor and the personnel director. Anderson asked to see Rushing in his office. Rushing refused to go, because he said the issue concerned all the pressers and because he feared being discharged in a private interview. The Company thereupon discharged Rushing (*id.* at 36a).

Most of the pressers immediately expressed support for Rushing and, protesting the decision to discharge him, told Anderson that if Rushing was fired, they might as well all be fired (Pet. App. C, p. 38a). The Company then gave the approximately 50 pressers their final checks and their termination slips, which reflected that they had been discharged for insubordination (*id.* at 39a).

On the above facts, the Special Master found that Rushing had been discharged "both for his concerted activity with others in the pressing department, which activity he initiated, but also for his public and adamant refusal to meet with the company plant manager to discuss the problem and complaint" (Pet. App. C, p. 36a). The Master found that the other pressers had been discharged "because they collectively protested the discharge of Nelson Rushing and refused to receive work under the conditions in existence in the pressing department" (*id.* at 39a). Despite those findings, the Master concluded that

[3] The Special Master sustained the Board's petition in a few respects (Pet. App. C, pp. 47a-48a, 69a-72a). Since that part of the case is not in issue here, the findings and conclusions relative thereto are not detailed in the Statement.

Rushing's discharge was not a violation of the court's decree because Rushing "was discharged for just cause, even though Rushing was also protesting what he believed was unfair," and because the "Company's actions surrounding his discharge were not shown to have been prompted essentially by any anti-union considerations" (*id.* at 48a-49a). The Master further concluded that the other pressers were "not justified in their demands that Rushing be reinstated or rehired * * * before they would return to work" and that they "were not discharged by the Company unreasonably under the circumstances, despite anti-union sentiment on the part of the Company" (*id.* at 49a).

b. Immediately after the Company discharged Rushing and the other pressers, picketing began at the Decaturville plant, with the Union's support and assistance. The picket signs stated that the employees were "on strike against [the Company] for unfair labor practices" (Pet. App. C, pp. 41a-42a). The next day, June 24, 1970, the Company addressed a letter to each of the pressers, except Rushing, offering "full and immediate reinstatement," provided that the pressers abandoned the strike and reported for work by a specified date (*id.* at 43a). Some of the pressers returned to work; others did not and continued to picket outside the Decaturville plant (*ibid.*). The Special Master concluded (*id.* at 49a) that, even if

> the Company acted improperly, unlawfully or unreasonably in discharging the pressers other than Nelson Rushing * * * for engaging in a concerted work stoppage, they should not now in equity be entitled to reinstatement since the Company offered to them full reinstatement on June 24, 1970, by letter which most chose to ignore or to decline.

Most of the other employees at the Decaturville plant, on and after June 26, 1970, joined the strike precipitated by the discharge of the pressers.[4] The Special Master found that they were striking "in protest of the discharges of the employees of the pressing department * * * and also in support of the Union's organizational efforts there" (Pet. App. C, p. 44a).[5] Thereafter, the Company denied reinstatement to strikers Judy Scott Maness and Peggy Cagle, and failed to rehire Ruth Bradley Campbell and Evelyn Phillips (*id.* at 48a).

The Special Master concluded that it was not unlawful or violative of the court's decree for the Company "to replace striking employees with others in

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[4] The Company subsequently sent letters to these employees, directing them to return to work by a specified date (Pet. App. C, p. 43a). Strikers who returned after the deadline set in the letters were required to fill out new employment applications and to return as new employees at the bottom of the seniority list (*id.* at 43a-44a).

[5] The Special Master also found that "All employees who went out on strike in protest of Rushing's discharge, claiming such to be an unfair labor practice, were in fact economic strikers as well as unfair labor practice strikers," and that the strike, while "essentially economic in its nature," had "connotations of concerted activity protected by the National Labor Relations Act" (Pet. App. C, pp. 49a-50a).

an effort to carry on its business" (Pet. App. C, p. 51a). Accordingly, "all that the Company should be required to do with those strikers (pressers and others) who had not otherwise been terminated for just cause * * * and who did seek re-employment" is to reemploy them upon their unconditional application "as and when there were vacancies" (*ibid.*). The Special Master further concluded that, although "there was substantial evidence to show that the Company refused" to rehire job applicants Campbell and Phillips and to reinstate strikers Maness and Cagle "because of their Union proclivities," no violation of the decree was established because "there was also substantial evidence to show other sound and justifiable business reasons for the decision not to take these employees back" (*id.* at 48a).[6]

c. In July 1970, strikes occurred at the Company's Loris and Frisco plants (Pet. App. C, pp. 68a, 78a). The Special Master found that, while the strikes at the Loris and Frisco plants were called and maintained in support of the Decaturville strike (*ibid.*), the Company's refusal to reinstate strikers Brice Todd and Robert Stephens upon their unconditional offers to return to work at the Loris plant did not

[6] The Special Master recommended that the Company be required to offer the strikers who had made unconditional applications for reemployment reinstatement to substantially equivalent jobs, "as and when such positions become available," with "restoration of seniority rights to the date of their termination in June 1970" (Pet. App. C, pp. 60a-61a). He also recommended that a similar offer be made to Maness and Cagle (*id.* at 59a-60a).

violate the decree because "Todd and Stephens joined the pickets in front of the company's Loris plant in an effort to get a union into the plant, as well as to protest what they considered unfair or unjust practices"; moreover, Todd and Stephens had been replaced before they made their offers to return (*id.* at 73a). The Master also found that the Company's refusal to reinstate strikers Randy Montgomery and Sandra Matchett upon their application to return to work at the Frisco plant did not violate the decree because they joined the strike "for economic reasons primarily rather than the subordinate claim or protest of an unfair labor practice" (*id.* at 82a).[7]

2. *The decision of the court of appeals*

The court of appeals adopted all of the Special Master's findings, conclusions, and recommendations (Pet. App. A, p. 4a). It stated (*id.* at 3a-4a):

> The Special Master's mere mention of impermissible motives possibly playing some role in the dismissal of Rushing and other employees hardly rises to the level of clear and convincing evidence of impermissible dismissals justifying a finding of civil contempt. A contempt proceeding is a setting very different from a normal

[7] The Master also relied on the four employees' failure to abandon the strike by the deadline specified in Company letters directing them to return to work (Pet. App. C, pp. 73a, 78a, 82a), and on the failure of Montgomery and Matchett "to advise management of the nature of their grievances concerning any alleged unfair labor practice" before they joined the strike (*id.* at 82a).

proceeding for the enforcement of a Board order. The burden imposed by the clear and convincing evidence standard is heavy. The Board has failed to demonstrate that the Special Master erred in his findings or conclusions.

REASONS FOR GRANTING THE WRIT

The decision below is contrary to this Court's decision in *National Labor Relations Board* v. *Warren Co.*, 350 U.S. 107, and, if left standing, would seriously weaken the administration of the National Labor Relations Act.

The court of appeals in this case had upheld the Board's findings that the Company had committed certain unfair labor practices, and had granted the Board's petition for enforcement in substantial part (Pet. App. D, pp. 88a-99a). Yet, on the Board's subsequent petition to have the Company held in civil contempt for failure to comply with the court's enforcement order, the court applied standards different from those applicable in an enforcement proceeding. The court justified its departure from established principles on the ground that "[a] contempt proceeding is a setting very different from a normal proceeding for the enforcement of a Board order"; it stated that the "clear and convincing evidence" test places a heavier burden on the Board in a civil contempt proceeding than in an enforcement proceeding (Pet. App. A, p. 4a). These conclusions, we submit, cannot be squared with this Court's decision in *Warren*.

In *Warren*, the Court held that where there is "clear and convincing" evidence that the court's enforcement order has been violated, as there is here, "it is the statutory duty of the Court of Appeals on petition of the Board to adjudge [the employer] in contempt of its enforcement decree" (350 U.S. at 112). Moreover, because the same substantive principles apply at both the enforcement and contempt stages and because "the court is required to grant enforcement of the Board's order" at the enforcement stage if "the Board has acted properly within its designated sphere," this Court made clear in *Warren* that "[t]he granting or withholding of such remedial action [contempt] is not wholly discretionary with the court" (*id.* at 112-113).

1. The Special Master found that Nelson Rushing was discharged in part because of concerted activity; that some 50 pressers at the Decaturville plant were discharged for striking over Rushing's discharge and their own working conditions; that various job applicants and strikers were denied reemployment or reinstatement at Decaturville in part because of their union proclivities; and that strikers at the Loris and Frisco plants were denied reinstatement following their participation in strikes called to support the strike at the Decaturville plant (*supra*, pp. 7-11). Having approved these findings as supported by the evidence, the court of appeals should have rejected the Master's conclusions that this Company conduct did not constitute violations of the decree, which, *inter alia*, barred the Company

from restraining or coercing "employees in the exercise of their right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection" (*supra*, pp. 4-5).

The Master's conclusions rest on the assumption that an employer may lawfully discriminate against employees for an impermissible reason if he also has a valid reason for his action. But this is not the law. As the Sixth Circuit and other circuits have recognized: "It is not necessary that a prohibited reason be the sole one. If the discharge is motivated in part by activities protected by the National Labor Relations Act it is a violation of Section 8(a)(1)." *National Labor Relations Board* v. *Elias Bros. Restaurants*, 496 F.2d 1165, 1167.[8] It

[8] Accord: *National Labor Relations Board* v. *Electric Steam Radiator Corp.*, 321 F. 2d 733, 738 (C.A. 6); *National Labor Relations Board* v. *West Side Carpet Cleaning Co.*, 329 F. 2d 758, 761 (C.A. 6); *National Labor Relations Board* v. *Adam Loos Boiler Works Co.*, 435 F. 2d 707 (C.A. 6); *National Labor Relations Board* v. *Whitin Machine Works*, 204 F. 2d 883, 885 (C.A. 1); *National Labor Relations Board* v. *Roberts & Sons, Inc.*, 451 F. 2d 941, 945 (C.A. 2); *National Labor Relations Board* v. *Local 282, Teamsters*, 412 F. 2d 334, 336-337 (C.A. 2), certiorari denied, 396 U.S. 1038; *National Labor Relations Board* v. *Princeton Inn Co.*, 424 F. 2d 264, 265 (C.A. 3); *National Labor Relations Board* v. *Hanes Hosiery Division*, 413 F. 2d 457, 458 (C.A. 4); *National Labor Relations Board* v. *American Mfg. Co. of Texas*, 351 F. 2d 74, 79 (C.A. 5); *National Labor Relations Board* v. *Tom Wood Pontiac, Inc.*, 447 F. 2d 383, 386 (C.A. 7); *Singer Co.* v. *National Labor Relations Board*, 429 F. 2d 172, 179 (C.A. 8); *National Labor Relations Board* v. *Ayer Lar Sanitarium*, 436 F. 2d 45, 50 (C.A. 9); *S. A. Healy Co.* v. *National Labor Relations Board*, 435 F. 2d 314, 316 (C.A. 10). Cf. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542.

is also settled that a strike caused by unfair labor practices is an unfair practice strike even if it also has economic objectives.[9]

From these principles, it follows that the Company violated the Act and the court's decree by discharging Rushing in part because of his concerted protest over working conditions,[10] and that its discharge of the other pressers for concertedly protesting Rush-

[9] *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898, 907 (C.A. 6), modified on other grounds, 356 U.S. 342; *National Labor Relations Board* v. *Louisville Chair Co.*, 385 F. 2d 922, 929 (C.A. 6), certiorari denied, 390 U.S. 1013; *National Labor Relations Board* v. *Sea-Land Service, Inc.*, 356 F. 2d 955, 966 (C.A. 1), certiorari denied, 385 U.S. 900; *National Labor Relations Board* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 269 (C.A. 2), certiorari denied, 375 U.S. 834; *National Labor Relations Board* v. *Cast Optics Corp.*, 458 F. 2d 398, 407 (CA. 3), certiorari denied, 409 U.S. 850; *San Antonio Machine & Supply Corp.* v. *National Labor Relations Board*, 363 F. 2d 633, 641 (C.A. 5); *General Drivers & Helpers Union, Local 662* v. *National Labor Relations Board*, 302 F. 2d 908, 911 (C.A.D.C.), certiorari denied *sub nom. Rice Lake Creamery Co.* v. *General Drivers & Helpers Union, Local No. 662*, 371 U.S. 827.

[10] Rushing's discharge for engaging in concerted activities, protected by Section 7 of the Act, was unlawful without regard to whether the discharge was "prompted essentially by any anti-union considerations" (*supra*, p. 8). See *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9, 12-13; *National Labor Relations Board* v. *Elias Bros. Restaurants, supra*, 496 F. 2d at 1167; *Hugh H. Wilson Corp.* v. *National Labor Relations Board*, 414 F. 2d 1345, 1347-1348 (C.A. 3), certiorari denied, 397 U.S. 935; *National Labor Relations Board* v. *Hanes Hosiery Division, supra*, 413 F. 2d at 458.

ing's discharge and their own working conditions was also unlawful.[11] Employees who joined the strike, called to protest the Company's unlawful discharges, became unfair labor practice strikers entitled to full reinstatement upon their unconditional applications for work. By denying full reinstatement to such strikers, and by refusing to reemploy job applicants, in part because of their union proclivities, the Company further violated both the Act and the decree.[12]

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[11] Even if Rushing had been discharged for good cause, a strike by the other pressers to secure his reinstatement would have been protected by Section 7 of the Act, and thus their discharge for striking would have violated the Act and the decree. See *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52-53; *National Labor Relations Board* v. *John S. Swift Co.*, 277 F. 2d 641, 646 (C.A. 7); *National Labor Relations Board* v. *Globe Wireless*, 193 F. 2d 748, 750 (C.A. 9).

[12] The Company's offers of reinstatement manifestly were not full and unconditional since they were conditioned on the employees' ceasing to exercise their statutorily protected right to strike, and employees who returned after the deadline specified by the Company were denied their seniority. See *National Labor Relations Board* v. *Southwestern Porcelain Steel Corp.*, 317 F. 2d 527, 531-532 (C.A. 10); *Ridgely Mfg. Co.* v. *National Labor Relations Board*, 509 F. 2d 185, 188 (C.A.D.C.). See also *National Labor Relations Board* v. *Mayrath Co.*, 319 F.2d 424, 428 (C.A. 7); *National Labor Relations Board* v. *Frick Co.*, 397 F. 2d 956, 961 (C.A. 3); *National Labor Relations Board* v. *Duncan Foundry and Machine Works, Inc.*, 435 F. 2d 612, 618 (C.A. 7). Moreover, the Company had no legitimate business reason for subsequently denying reinstatement to strikers when they applied after the purported deadline. As unfair labor practice strikers, the employees were entitled to reinstatement without regard to whether the Company had hired replacements. *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 379, n. 5; *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278. Finally, the Master erred in suggesting that certain strikers lost the protection of the Act by failing to give advance notice of the causes for their protest. See *National Labor Relations Board* v. *Washington Aluminum Co,. supra*, 370 U.S. at 13-15.

2. The court of appeals purported to justify its refusal to apply these principles here on the ground that the "clear and convincing" evidentiary test imposes a more stringent burden on the Board in civil contempt proceedings than that imposed in a proceeding to enforce an order of the Board. However, that test applies only in determining whether certain facts have been established; it does not license the court in a contempt proceeding to apply to facts which have been established by clear and convincing evidence, different substantive principles than it would in a proceeding to enforce the Board's order. This Court so held in *National Labor Relations Board* v. *Warren Co.*, 350 U.S. 107, reversing 214 F.2d 481 (C.A. 5).

In *Warren*, the court of appeals had held that, while "a respondent may not show as a defense in an enforcement proceeding that the union has lost its majority," this principle has "no application in a contempt proceeding to which entirely different considerations apply." 214 F. 2d at 485. This Court disagreed, holding that it was "the statutory duty of the Court of Appeals on petition of the Board to adjudge [the employer] in contempt of its enforcement decree." 350 U.S. at 112. "To conclude otherwise would

greatly weaken the administration of the National Labor Relations Act" (*ibid.*).

In the instant case, the Company's conduct, which was established by clear and convincing evidence, violated the Act and the decree under the substantive principles applicable in proceedings to enforce an order of the Board. Thus, under *Warren*, it was the "statutory duty" of the court of appeals to adjudge the Company in civil contempt for violating its decree.

3. It is important to the administration of the Act that the error of the court of appeals be promptly corrected. As indicated by this Court in *Warren*, the National Labor Relations Act, like comparable regulatory statutes, depends for its effective enforcement upon the exercise by the courts of appeals of their contempt powers. A Board order is not enforced until it is actually obeyed (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 269-270), and Congress clearly relied upon the remedy of contempt as the ultimate sanction to secure obedience (*National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563, 569).[13] As the Court stated in *Warren* (350 U.S. at 112-113):

> [The National Labor Relations] Act contemplates cooperation between the Board and the Courts of Appeals both at the enforcement and the contempt stages in order to effectuate its purposes. It consigns certain statutory functions to each, and where the Board has acted properly within its designated sphere, the court is required to grant enforcement of the Board's order. The decree, like the order it enforces, is aimed at the prevention of unfair labor practices, an objective of the Act, and so long as compliance is not forthcoming that objective is frustrated. It is for this reason that Congress gave the judicial remedy of contempt as the ultimate sanction to secure compliance with Board orders. The granting or withholding of such remedial action is not wholly discretionary with the court. This is true not only under the National Labor Relations Act but also under general principles of equity jurisprudence. [Footnotes omitted.]

Where, as here, the facts establish a continuing course of unfair labor practices covered by the terms of the court's decree, the withholding by the court of appeals of appropriate relief is an abuse of discretion. For, in determining whether a decree has been violated, "legal discretion * * * does not extend to a refusal to apply well-settled principles of law to a conceded state of facts." *Union Tool Co.* v. *Wilson*, 259 U.S. 107, 112. See, also, *Albemarle Paper Co.* v. *Moody*, No. 74-389, decided June 25, 1975, slip op., p. 9. The denial of the contempt sanction in circumstances such as those here subverts the enforcement decree, and thus undermines the statutory structure for preventing unfair labor practices at

[13] Accordingly, "[t]he filing of a civil contempt petition is not to be regarded as the institution of an independent proceeding but as a part of the original cause." *Wirtz* v. *Ocala Gas Co.*, 336 F. 2d 236, 243 (C.A. 5). Accord: *Parker* v. *United States*, 153 F. 2d 66, 70 (C.A. 1); *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302, 305 (C.A. 2).

its crucial contempt stage—contrary to this Court's decision in *Warren* and its admonition in *Maggio* v. *Zeitz*, 333 U.S. 56, 69, that the contempt remedy for noncompliance with a court order should not be withheld on grounds that would serve "to foster experimentation with disobedience."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. MILLER,
Acting General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

NORTON J. COME,
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MARION GRIFFIN,
Attorney,
National Labor Relations Board.

AUGUST 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 18,064, 18,154, 18,249, 18,250, 18,256

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DECATURVILLE SPORTSWEAR CO., INC., ET AL., RESPONDENTS

Decided and Filed May 23, 1975

ON ORDER OF REFERENCE PURSUANT TO PETITION TO ADJUDGE RESPONDENTS IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF

Before: CELEBREZZE, PECK and LIVELY, Circuit Judges.

PER CURIAM. Petitioner originally brought this action in September 1971, seeking to have Respondents held in civil contempt for failure to comply with this Court's judgment in *Decaturville Sportswear Co.* v. *NLRB* 406 F.2d 886 (6th Cir. 1969). That judgment granted enforcement of a Board order requir-

ing Respondents to cease and desist from unfair labor practices in connection with ongoing unionization activity at Respondents' various clothing manufacturing plants. By order of this Court the matter was referred to a Special Master, the Honorable Harry W. Wellford, United States District Judge for the Western District of Tennessee.

The case has now returned to this Court on exceptions taken by both the Board and Respondents to the findings of fact, conclusions of law and recommendations of the Special Master, as set out in two lengthy memorandums, dated October 5, 1973, and June 12, 1974. The Board accepts the Special Master's findings of fact but challenges a number of his conclusions of law. Respondents, for the most part, challenge a number of the Special Master's findings of fact as clearly erroneous.

Briefly summarized, the situation out of which this dispute arose is as follows. On June 23, 1970, Nelson Rushing, an employee in the pressing department of the Decaturville, Tennessee plant, was discharged. The master concluded that he was discharged because of insubordination. The Board contends that Rushing's union proclivities were at least part of the reason for Rushing's discharge.

Rushing's discharge prompted a walkout of approximately fifty fellow pressers. These employees were then discharged. However, the Company sent each a letter the following day offering full reinstatement. The Special Master concluded that the pressers were not justified in demanding that Rushing be reinstated and therefore their discharge was also not improper. The Special Master noted that in light of the reinstatement offer equity would not dictate reinstatement even if the employees had been unreasonably discharged. The Company's refusal to hire certain applicants or to rehire or reinstate various other striking employees was also found proper by the Special Master.

Following the discharge of the Decaturville pressers some employees went out on strike at the Company's Loris and Frisco plants, in South Carolina and Alabama. The Special Master concluded that the strikers at these plants were striking, at least in part, for their own economic reasons and therefore their walkout without notice to the Company and without making any effort to advise management of the nature of their grievance was not protected activity under the Act.

To hold Respondents in civil contempt we must find clear and convincing evidence in the record which proves that Respondents have violated a judgment of this Court. *NLRB* v. *Lynair, Inc.*, 380 F.2d 286 (6th Cir. 1967), *NLRB* v. *Local 5881, United Mine Workers of America*, 323 F.2d 853 (6th Cir. 1963).

A review of the record of this case, including the exceptions to the Special Master's Report, and the briefs filed in support of those exceptions fails to convince this Court that the Special Master's findings, which were based on two years of fact finding were clearly erroneous.

The Special Master's mere mention of impermis-

sible motives possibly playing some role in the dismissal of Rushing and other employees hardly rises to the level of clear and convincing evidence of impermissible dismissals justifying a finding of civil contempt. A contempt proceeding is a setting very different from a normal proceeding for the enforcement of a Board order. The burden imposed by the clear and convincing evidence standard is heavy. The Board has failed to demonstrate that the Special Master erred in his findings or conclusions.

The findings, conclusions and recommendations of the Special Master are hereby adopted.

Each party to bear own costs.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

18,064
18,154
Nos. 18,249
18,250
18,256

[Filed May 23, 1975, John P. Hehman, Clerk]

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DECATURVILLE SPORTSWEAR CO., INC., ET AL., RESPONDENTS

ORDER

Before: CELEBREZZE, PECK and LIVELY, Circuit Judges.

Upon consideration the findings, conclusions and recommendations of the Special Master are hereby adopted in accordance with the opinion filed today.

Each party to bear own costs.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

Issued as Mandate: June 27, 1975

COSTS: NONE

A True Copy.
ATTEST:

John P. Hehman
Clerk

By /s/ Grace Keller
Chief Deputy

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 18,064
18,154
18,249
18,250
18,256

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

DECATURVILLE SPORTSWEAR CO., INC., ET AL.,
RESPONDENTS

MEMORANDUM

This is an action instituted by the National Labor Relations Board, petitioner, (hereinafter referred to as The Board or NLRB) in which the United States Court of Appeals for the Sixth Circuit is requested to adjudge Decaturville Sportswear Co., Inc. and the other respondents to be in civil contempt of the decree of the United States Court of Appeals for the Sixth Circuit for failing and refusing to comply with the judgment entered on January 29, 1969,[1] and for other civil relief. The International Ladies' Garment Workers' Union, AFL-CIO, sought to intervene in the cause, a motion opposed by both the parties be-

[1] 406 F.2d 886.

fore the special Master. By an order dated May 4, 1972, the Master denied the Union the right of intervention for the reasons therein stated. The Master permitted the Union's counsel, however, the right of limited participation, and the Union counsel cross-examined some witnesses and offered others in support of the Board's position and its contentions. This case was tried before Harry W. Wellford, United States District Judge, sitting as Special Master, on various dates between May 2 and May 15, 1972, at Jackson, Tennessee, and the Special Master having considered the pleadings, the exhibits, the testimony of witnesses, the statements of counsel, and the entire record in this cause and being fully advised in the premises, finds the facts and states the conclusions of law as follows:

I. Decaturville Plant

A. Wage Increases

1. Among other things, this Court's order included a direction to cease and desist from:

> promising or granting to employees benefits, such as paid holidays, insurance, or vacation or bonus pay, when the purpose thereof is to interfere with the self-organizational efforts of employees or to induce employees to reject or refrain from activities in support of International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization.

The Company's plant at Decaturville is charged with having violated the Court's decree by granting wage

increases to their employees in July, 1969, January 1970, and July 1970, "with the effect of, interfering with, restraining, and coercing employees in the exercise of their rights to self-organization."

2. The Company [2] granted a wage increase to 274 of its hourly-rated employees at the Decaturville plant effective July 14, 1969. This wage increase varied in amount from five cents per hour to ten cents per hour. In the past, the Company had from time to time at irregular intervals granted wage increases of substantially similar amounts to employees having the same or equivalent job classifications. Some wage increases were necessary to comply with minimum wage statutory increases.

3. On or about December 27, 1969, the Decaturville plant granted wage increases to 288 of its hourly-rated employees in accordance with its past practice. The increases granted were generally in the amount of ten cents per hour. In addition, in January of 1970, the Company advanced the base rate for piece-rated employees from $1.75 to $1.85 per hour. The increase in the base rate did not, however, result in a wage increase to all of the employees compensated on a piece-rate basis. Both the wage increase of ten cents per hour to the hourly-rated employees and the change in the base rate from $1.75 to $1.85 per hour were in accord with the Company's past practice of granting periodic wage increases

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[2] "The Company" refers here to Decaturville Sportswear Co., Inc., but it is a wholly owned subsidiary of defendant Marlene Industries Corporation.

and/or changes in the base rate and were motivated, in part, by its desire to retain its competitive position in the labor market in the Decatur County area.

4. On or about July 13, 1970, the Company granted a similar wage increase to 264 hourly-rated employees at the Decaturville plant and increased the base rate for employees compensated on a piece-rate basis from $1.85 to $2.00 per hour.

5. The effect of the increases in the base rate was to increase the "potential" for increased earnings to production workers. Hence, those employees able to make their production quota would receive an actual increase in earnings with the increase of the base rate.

6. During 1969, Plant Manager, Lloyd Anderson, submitted a proposal to his superiors recommending a progressive increase system be installed so employees would be aware of how much to expect, but he received no response from his superiors relating to his wage proposal. As a new plant manager, he did not participate in the July, 1969, raise but was consulted on the two subsequent increases. Although increases have been given since 1970, none were across-the-board. The increases in which Anderson participated in 1969 and 1970, were initiated by his superiors.

7. In 1969 and 1970, profits of Marlene Industries were less than they had been in prior years.

B. Unlawful Restraint or Discrimination Against Employees

1. The Court's decree has been in full force and effect since its entry on January 29, 1969, and at all times herein the Company has had notice and knowledge of its terms.

2. The Court's decree, in pertinent part, specifies that respondent will cease and desist from:

> (a) Discharging, laying off, forcing termination of, or otherwise discriminating against employees, in order to discourage membership in or support of International Ladies' Garment Workers' Union, AFL-CIO, [hereinafter referred to as the Union] or any other labor organization, or encouraging or permitting employees to engage in anti-union activity while prohibiting employees from engaging in activity on behalf of the Union.
>
> (b) Engaging in surveillance by photographing employees engaged in union organizational activities.
>
> (c) Creating an impression of surveillance of employees' union activities by telling employees that the Employer has lists of employees who engaged in union activities.
>
> (d) Threatening employees with discharge or other reprisals if they become or remain members of the Union or give assistance or support to it.
>
> (e) Interrogating employees concerning their or other employees' union organizational activities or their opinions regarding union organization.
>
> (f) Instructing employees to watch for union activities and listen for opinions regarding union

organization of other employees and report findings to us.

(g) Threatening employees with closing or moving the plant should they engage in activities on behalf of the Union or select the Union as their collective-bargaining agent.

(h) Coercing employees by telling them that other employees had been discharged or would not be recalled because of their union activities.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities.

3. Maria Stanfill

(a) The Union has been attempting to organize the Company's employees since 1965. In the spring of 1969, the organizing campaign was intensified as a result of this Court's order which, among other things, afforded the Union access to Company's parking lots and bulletin boards in furtherance of the Union's organizational efforts. Decaturville complied with these affirmative requirements fully, and the Union utilized these privileges actively.

(b) Maria Stanfill began working for the Company in 1964. She was employed as a "hemmer"

under the supervision of Jo Essary (now Crawford). During June or July, 1969, Stanfill signed a union authorization card in the Company parking area. Assistant Plant Manager David Perrin who was standing approximately 15 feet away may have observed her sign the card.

(c) Maria Stanfill claimed that her supervisor queried her during the summer of 1969 about purported union activities, a charge the Company and the supervisor involved, denied.

(d) Stanfill began experiencing a change in her working conditions after the arrival of the new Plant Manager, Anderson, in 1969. Prior to Anderson, Stanfill would receive, for repair purposes, only those pairs of slacks which needed to be redone. Afterward, however, supervisor Essary would bring her an entire bundle of slacks whenever repairs were required, even if the repairs entailed only several pairs of slacks out of the bundle. As a result of such procedure, Stanfill was required to take production time, to search through entire bundles for specific pairs which needed repairing, and she was paid on the basis of the amount of pairs produced.

(e) On August 14, 1969, Stanfill claimed to be nervous or ill while working in the plant. At the same time, Stanfill expressed dislike for the type of material which she was sewing that day and stated that the work made her nervous. She reported her problem to Supervisor Essary and requested permission to leave the plant so that she could obtain medication and she wanted to change the work then as-

signed her. Essary stated that she would have to obtain the approval of Assistant Plant Manager Perrin before Stanfill could leave the plant under the circumstances. At that point, Essary left to find Perrin. She returned shortly thereafter and informed Stanfill that Perrin would not give permission for her to leave the plant. Stanfill made no request to see Perrin herself before she decided to leave the plant, nor did she contact the plant that day or the next. Stanfill, who had visited her doctor in the intervening period, returned to the plant on August 18, with a note from the doctor. When Stanfill reached her work station, however, Essary directed her to report to Plant Manager Anderson's office. Pursuant to this order, Stanfill reported to the office where Anderson, Pollard and Perrin participated in a conference with her. Anderson told her that she no longer worked at the plant, since she had "voluntarily quit." Stanfill denied that she had quit, stating that she had "to go to the doctor" and had claimed to have been given permission to leave by Essary, which was denied by said supervisor. Stanfill had a prior somewhat erratic performance record with the Company.

I find there is insufficient clear and convincing evidence that Maria Stanfill was discharged because of her activities on behalf of the Union organizing effort. The Company did not discharge or involuntarily terminate employee Maria Stanfill on August 18, 1969, if she did not quit, for union activities.

(f) Stanfill also claimed to have been interrogated with respect to her Union sympathy by her supervisor. The Company doubtless knew of her Union disposition because others in her family were also so disposed, and because she may have made her Union affiliation apparent. While the supervisor denied any such inquiry, I find that Stanfill was queried about her Union inclination, by a company supervisor, but she was not coerced, threatened, or discharged because of her pro-union disposition.

4. Betty Williams

(a) Williams became a Decaturville plant employee in 1964 or 1965 and worked thereafter at various jobs in the plant. She apparently enjoyed a special relationship with the plant superintendent, Raymond Rindone, and under him, advanced to a quasi-supervisory type position in the thread department in 1967. She answered directly to Rindone until his discharge by the Company for conduct inimical to its interests.[3]

(b) After Rindone was replaced by Lloyd Anderson as plant manager in 1969, Williams' position changed. Neither Anderson nor his assistant, Perrin, gave her authority over others in the thread department or as a supervisor.

(c) Williams reported to Anderson the union sympathies of others in the thread department. Under Anderson's direction, there was obvious signs of "tightening up" in the thread department and some

[3] Rindone's role will be discussed hereafter.

reassignments of responsibilities purportedly for greater operating efficiency. Williams continued to be paid hourly and she continued, for payroll category purposes, in the same status as she occupied when Rindone was manager.

(d) Williams was injured in an automobile accident in August, 1969, and after recovering returned to work in a different capacity. Her replacement in the thread room, Ruben Moore, was carried on employee pay records in July 1970, as supervisor of the thread room. I find that Betty Williams, during the year 1969, was not a supervisor within the meaning of Section 2(11) of the Act, although she probably had been considered in that status by previous plant manager, Rindone, for personal as well as company purposes.

(e) I find that Betty Williams was not discriminated against by the Company by reason of any union sympathy or activities.

5. Benson Rushing

(a) Benson Rushing was known to be a Union supporter in the summer of 1969. Prior to December of 1969, several of the employees at the Decaturville plant, including Benson Rushing, regularly used the plant's station wagon to run errands.

(b) In December 1969, the Company hired an employee to drive the station wagon on a full-time basis and discontinued the use of the vehicle on a part-time basis by those employees who had previously used it to run errands including Rushing. Af-

ter December 1969, neither Benson Rushing nor any other employee was assigned to duties involving the driving of the Company station wagon on a part-time or casual basis. Nelson Rushing was reassigned to other duties, including pushing buggies of thread into other departments.

(c) I find that the Company did not unlawfully harass, intimidate, nor discriminate against Benson Rushing by reason of his union sympathy or activities. Neither did the employer unlawfully or in derogation of this Court's orders assign more arduous duties under more difficult circumstances in retaliation for his Union organizational activities, if any. Benson Rushing did not testify in these hearings.

6. R. C. Brashers

(a) R. C. Brashers began working for the Company in January, 1966, and worked as a "legger" in the pressing department. He served on the Union's in-plant organizing committee and his name appeared in a telegram the Union sent to the Company on July 23, 1969, which listed those employees serving on the committee. Brashers signed a Union authorization card, solicited fellow employees to sign cards and collected signed cards from a number of employees. He wore a Union button in the plant, attended Union meetings and engaged in handbilling the plant, when the Union began such activity, pursuant to the Court's order in June, 1969.

I find from the above activity that the Company became aware of Brashers' union activity on or before July 23, 1969.

(b) On or about August 8, 1969, Pressing Supervisor Stevens told a group of pressers, including Brashers, that because of a shortage of work they were to be laid off for approximately one week or 10 days. In response to a question, Stevens stated that the laid-off pressers were permitted to seek employment during the week of their layoff so that they could "make some extra money," provided that they reported back to work on Monday, August 18. Presser Oscar Smith, who was present during this conversation, also testified that Stevens gave the pressers permission to seek other employment during the layoff. Another presser, Eldridge Burge, moreover, who had been laid off the week previous to August 8, stated that Stevens had told the group laid off at that time that they could obtain other employment during the layoff.

During the week of his layoff, Brashers found work as a presser at a nearby plant operated by Salant and Salant, Inc. He began working at Salant and Salant during the week of his layoff and worked only a couple of days. Brashers returned to the plant on August 18, ready to resume his duties as a presser. His immediate supervisor, Joe Kennedy, advised him to report to the personnel office, and Personnel Manager Pollard informed Brashers that since he had accepted employment with Salant and Salant he was deemed to have "quit" the Company's employment. When Brashers denied that he had quit, Pollard called Plant Manager Lloyd Anderson and Stevens to the office. Anderson reiterated that Brashers had quit. Brashers once again, denied that he had quit, pointing out, instead that the pressers had received Stevens' permission to seek and accept employment during the layoff. Stevens admitted that he, indeed, had permitted the pressers to find temporary employment so that they could have a chance to earn money while they were laid off. Thereafter, Brashers left the plant and he subsequently received a termination slip in the mail, which stated that he had voluntarily quit due to his having taken "other employment."

I find that there is substantial evidence that R. C. Brashers was discharged from Decaturville Sportswear, at least in substantial part, because of his activity on behalf of the Union organizing effort.

(c) The Company maintains that it has a firm policy against permitting a laid off employee to seek permanent employment elsewhere during the lay-off. There was evidence to the effect that Brashers applied at Salant and Salant on a permanent status contrary to Decaturville's rules. In this instance, however, the action taken by the Company towards Brashers, a long-time employee, who was seeking understandably to augment his income in accordance with a supervisor's suggestion,[4] appears to be motivated

[4] It may be that Stevens' suggestions about seeking work elsewhere were misunderstood by Brashers and the other pressers. I credit Brashers with the sincere belief that he was encouraged to seek temporary work elsewhere during the lay-off.

in substantial part by its desire to defeat the Union in its organizational activities.

7. Martha Thomas

(a) On or about October 14, 1969, employee Martha Thomas was directed by her supervisor to go to the office of plant manager Anderson because of Thomas' poor production. Present in Anderson's office were personnel director Pollard and assistant plant manager David Perrin. During the discussion Anderson advised Thomas to the effect that she could not get by without making production.

(b) This conference or discussion was recorded by a recorder in plain and obvious view during this discussion. Thomas claimed that Anderson, in substance, warned her about supposed Union sympathies. There is no support for her contention.

(c) I do not find that employee Martha Thomas was interrogated about nor interfered with concerning her Union sympathies by plant manager Lloyd Anderson under all the circumstances.

8. Doris Thorp

(a) On or about March 9, 1970, a Monday, employee Doris Thorp was called into Anderson's office because she had left work early without permission on Friday of the preceding week. During the conversation between Thorp and Anderson, she claims that he asked whether she belonged to the Union.

(b) Thorp was disgruntled because of the work assignment given to her, and because she was given

no explanation satisfactory to her about being assigned to joining work rather than side-seaming. She was, among other things, warned by the plant manager about her leaving the plant without permission, but she was not discharged.

(c) I find there is no clear or convincing evidence taken as a whole that plant manager Anderson interrogated employee Doris Thorp concerning her Union sympathies.

9. Ruth Bradley Campbell

(a) Ruth Bradley Campbell began her employment with Decaturville Sportswear in 1960, as Ruth Bradley, and had worked on several separate occasions since that time. On each occasion in the past, Campbell had voluntarily quit her employment. Her last period of employment before the episodes in question began in July 1968, when she was placed in the sewing department "serging flies," in which department her supervisor was Ruth Maness. During her employment, Campbell had performed most of the sewing operations available in the plant. She testified that she signed a Union card in July of 1969, wore a Union button in the plant, attended Union meetings and passed out authorization cards to other employees in the plant. In November or December of 1969, Mrs. Campbell told Maness, her supervisor, in response to an observation that the Company had a right to raise production, that such action was the reason why the employees needed a good union, and "if we had a good union they

wouldn't raise it when they wanted to." In addition to speaking in favor of the Union to employees, Campbell also for a period of two or three weeks, had Union literature and handbills laying on her machine.

I find that the Company was or became aware of Campbell's Union activity in or about November or December 1969, or perhaps before that time.

(b) On or about March 16, 1970, in the course of her duties, Campbell twisted her arm at the elbow while lifting a bundle of clothes. She advised Maness of the injury but continued working for the remainder of the day. The following day upon returning to work, Campbell discovered that swelling had developed in her arm, and after advising Maness of this fact, she visited the plant nurse in the first aid room. Campbell was directed by the nurse to see the Company doctor, Dr. Fisher, who examined and treated her arm on or about March 18, 1970. Fisher recommended that Campbell stay home from work for a few days and give her arm an opportunity to respond to treatment. Campbell remained off for two weeks, but then consulted the doctor about returning to work since she needed the earnings. Bradley had experienced muscle spasms previously in her left arm and shoulder during the year 1968. She was treated by her own doctor at this time, and based upon his examination, he recommended that she change jobs for a period of time until the spasms were relieved. During this period Campbell made a number of visits to Dr. Fisher. On or about the 28th of March, 1970, she returned to the Company

with the statement prepared by Dr. Fisher which recommended that she should "avoid heavy lifting". Upon returning to the plant, Campbell presented Dr. Fisher's slip to Maness who indicated that she would try to find something light for her to do. She then met with Pollard and showed him Dr. Fisher's statement. Pollard told her that he had nothing for her to do unless she was prepared to return to her old job of serging flies, but suggested she seek a leave of absence until she was physically able to handle this job. This was in accord with the employer's policy in situations of this kind. After concluding that she could not continue this work and after the refusal of requested lighter work, Campbell assumed that she had been fired and left the plant without applying for a leave of absence. She subsequently received a termination slip dated March 30, 1970.

(c) Campbell did thereafter return to Dr. Fisher because of a continued problem in her arm. She was, however, advised that Dr. Fisher had dismissed her from his care and, as a consequence, the Company's insurance no longer covered her condition. She concluded, apparently, that inasmuch as she would have to pay for the doctor herself she would stop seeing Dr. Fisher and go to her own doctor; and then began seeing Dr. Earl Salhany in Lobelville, Tennessee, who advised her that she had torn ligaments in her arm. Subsequent to obtaining a statement from Dr. Salhany on April 10, to this effect, Campbell returned to the plant where she showed the statement to Pollard, the personnel director. She

applied for and received workman's compensation, receiving the last check on approximately June 29. Although she continued to remain under Dr. Salhany's care, she was, at the request of the Company, directed to go to Nashville for an evaluation by an independent physician, Dr. Davis, who concluded that her arm had healed satisfactorily and that she was able to return to work on a regular basis.

(d) Campbell then returned to the Decaturville plant and spoke with Anderson, the plant manager, after filling out an application for employment. She told Anderson that she had three children to support and needed work. After inspecting Campbell's personnel file with Pollard, she was refused an opportunity for reemployment.

(e) Campbell testified that after the period of receiving workmen's compensation benefits had expired when she sought reemployment unsuccessfully, Anderson observed that if he hired her, she would probably soon quit to join the picket line. At this time, however, the Company was advertising for skilled employees, such as Campbell in the sewing department.

(f) I find there is insufficient evidence to establish that Ruth Bradley Campbell was discharged from the Company because of her activity by and on behalf of the employees' Union organizing campaign. I further find, however, that there is a substantial basis to determine that she was refused reemployment on or about June 30, 1970, because of the Company's fear that she would engage in Union activities, if

re-hired. This was coupled with a reluctance to rehire an employee who had a history of physical complaints in the past; quitting, and workmen's compensation problems.

10. Bennie Hamm

(a) Bennie L. Hamm began working for the Company in January, 1966, as a floor helper in the pressing department. He served on the Union's organizing committee and his name appeared on a telegram the Union sent to the Company on July 23, 1969, which named those employees who served on the committee. Hamm was active in a Union organization effort throughout 1969. Additionally, during this time Hamm appeared on a Union-sponsored radio program, heard in the Decaturville area, on which he spoke on behalf of the Union.

I find from the above evidence that the Company was or became aware of Hamm's Union activity on or before July 23, 1969.

(b) After Anderson became plant manager, room supervisor Stevens began treating Hamm differently as there was a tightening of procedures in the pressing department, and he would warn him to stop talking on the job. Additionally, Stevens warned Hamm that he was using the restroom facilities too frequently. Hamm was illiterate, but this problem had not been mentioned as a difficulty attendant to his continued employment. The Company witnesses gave a variety of reasons attesting to the importance of employee ability to read and write.

Initially it should be noted, however, that the Company has no policy barring the hiring of illiterates.

(c) On April 23, 1970, Hamm sustained an injury in the plant while lifting some boxes. Shortly thereafter, he was examined by a physician who advised him that an operation was necessary. Hamm was granted an extended leave of absence on April 30, 1970, for surgery. Approximately eight weeks later, Hamm returned to the plant at the expiration of his leave of absence with a note from his doctor releasing him from further medical care. At that time, Hamm met with Personnel Manager Pollard. Pollard informed Hamm that, while he would place Hamm's name on the active list of employees, he was simultaneously laying him off by reason of lack of work. Hamm's particular job during the interim, had, in fact, been abolished.

(d) During the time Hamm was away from work recuperating from his injury, the Company phased out certain of its pressing operations so that when Hamm returned for work, his particular job no longer existed. Hamm was not qualified, according to the employer's testimony, for any alternate jobs as may have been available. As a consequence, on or about June 15, 1970, Hamm was laid off ostensibly for lack of work. After having drawn six weeks' unemployment compensation at the plant, Hamm was terminated in August 1970.

(e) I find there is substantial basis to determine that employee Bennie L. Hamm was discharged at the Decaturville Sportswear Plant because of his

support and assistance in behalf of the employees' Union organizing effort. No doubt he was handicapped by his inability to read and write, but the Company at the time was seeking experienced help, and Hamm had been able to do his job for a number of years before his injury.

11. Nellie Mills and Paulette Rushing

(a) Nellie Mills was a long-time employee at the Decaturville plant in supervisor Carolyn Pratt's serving department. She and a co-employee, Paulette Rushing, engaged in a conversation together on or about June 24, 1970, just before joining the strike, about being laid off, insufficient work, and production. The supervisor observed to them both that she hated to see everyone walk out because she feared for her own and her husband's jobs.

(b) Paulette Rushing was the sister-in-law of Nelson Rushing, (who will be discussed hereinafter) discharged by the Company the day before, and was also a long-time employee at the Decaturville plant.

(c) I find that the statement was made by reason of a natural and normal apprehension of the supervisor under the circumstances, and did not constitute a threat of plant closure.

12. Donald Pettigrew

(a) On June 23, 1970, the day when the strike commenced at Decaturville, Donald Pettigrew, whose mother was already an employee of the Company.

appeared at the plant and completed an application for employment. Later that day, he received a phone call at his home from someone whom he believed was a secretary at the plant, advising him to report for work the following morning.

That next morning, Pettigrew reported to the plant, and with four other applicants, met with Personnel Director Pollard, who indicated they had been hired. Pollard outlined various plant rules and inquired if any of them could perform work as pressers.

(b) At that point, the meeting was interrupted by one of the personnel staff, who informed Pollard that some of the employees had just walked out. Pollard then left his office; returned shortly thereafter, and then asked all of the prospective new employees, except Pettigrew, to leave the office. Pollard then told Pettigrew that he was not going to hire him. When pressed by Pettigrew as to the reason, Pollard indicated that it was because his mother walked out with the others. In response, Pettigrew stated that "just because [my mother] walked out [doesn't] mean I'm going to walk out". Pettigrew then left the plant without being hired.

(c) Pettigrew had previously unsuccessfully applied for work at the Decaturville plant while in school, and he had also applied for work unsuccessfully a number of times before at nearby Salant & Salant. Other persons were hired in the pressing department as needed on June 24, 1970, because of the walkout.

(d) I find that Donald Pettigrew was refused employment because the Company feared that he would engage in Union activity.

13. Linda Williams

(a) Employee Linda Williams joined the strike on June 26, 1970, and appeared on the picket line. Upon arriving home in the afternoon on that day she received a telephone call purportedly from her supervisor (or former supervisor) Edna Hendon, a good friend. Hendon asked Williams if she thought that the employees were going to do any good by going out on strike and was she doing the right thing by going out and losing her job. Hendon confirmed the fact that she did call Williams the day she walked out and asked her to think it over and come back to work.

(b) Hendon was later in early 1971, demoted and quit rather than accept a new job assignment. She obviously harbored some resentment against the Company for what she considered mistreatment in denying that she had received warnings about the quality of her work as a supervisor. The Company was, however, dissatisfied with Hendon's job performance.

(c) I find supervisor Edna Hendon interrogated employee Linda Williams about her Union activities.

14. Lois T. Page

(a) Employee Lois T. Page joined the strike sometime after a July 4, 1970 vacation. Shortly be-

fore that vacation, she testified that a supervisor, Parker Maness, approached her at her sewing machine and asked if she were going to join the strike; Maness then purportedly indicated that he supposed some of the people that walked out would probably be fired.

(b) Maness denied this conversation in its entirety. I find a lack of clear and convincing evidence that supervisor Parker Maness did anything more than interrogate employee Page about her Union activities, if he did even this. I find no threat or coercion on the part of supervisor Maness.

15. Evelyn Phillips

(a) Evelyn Phillips had worked off and on for Decaturville from 1964 until 1969. She had previously twice been fired and had consistently been a low production worker at the plant. In 1969, she had quit after previous leaves of absences. Altogether, her record prior to 1970 was an unsatisfactory one.

(b) On or about July 24, 1970, Evelyn Phillips appeared at the plant, filled out an employment application and was interviewed by Personnel Director Pollard. Phillips expressed a preference for a position as a "tacker," a job she had performed when she worked for the Company on prior occasions. Pollard then contacted Phillips' former supervisor in the tacking department and inquired if she needed another tacker, and Pollard advised Phillips that a tacking position was available.

(c) Phillips' husband was a relative of Nelson Rushing, a leader in the strike. On July 27, Phillips returned to the plant and reported to Pollard's office. At that time, Pollard informed Phillips that he was sorry that he could not use her, apparently fearing that she, too, would join the strike. She then left the plant and did, in fact, join the picket line.

(d) I find that job applicant Evelyn Phillips was denied employment by the Company on July 24, 1970, in part because of the Company's fear that she might engage in Union activities, but also because she had a poor previous record.

16. Judy Scott Maness

(a) Before her marriage, as Judy Scott, Mrs. Maness had worked at Decaturville for about a year. After moving away, she returned in late 1969 to work and joined the strike on or about June 26, 1970. During September of 1970, she abandoned the strike and asked to be re-employed. The Company had on June 26, 1970, sent her a letter directing her to return to work by the following Monday or she would be replaced.

(b) She was questioned when she returned as to her complaint and the basis for her walking out. Her complaint was related to frequent changes in production procedures and quota which she termed an "unfair labor practice" and had nothing to do with the Nelson Rushing-pressers situation. She was told that she would be called if a place became available but that her position had been filled. Later, in Oc-

tober of 1970, she returned to the plant and signed a termination notice "voluntarily quit as of June 26, 1970" after having been requested to do so. She felt this was necessary to get a separation slip in order to get another job if Decaturville had nothing for her.

(c) Maness made an unconditional application for re-employment in September 1970.

17. Peggy Cagle

(a) Cagle had been a seven year employee of Decaturville when she walked out June 24, 1970, to support Nelson Rushing, another long-time employee, who had been fired. She was also dissatisfied at the time about her job assignment. She abandoned the strike to seek to return to work in September of 1970. As in the case of Judy Maness, she was asked to fill out a new employment application, and her reasons for joining the strike were inquired into.

(b) She also was sent a letter on or about June 24, 1970, by the Company directing her to report in a few days or she would be replaced. She received this letter, and like Maness, did not return as directed. She was told in September that her tagging job had been filled but they would call her in a few days if there were an opening. On or about October 8, 1970, Cagle returned to the plant and signed a termination notice, "voluntarily quit as of June 24, 1970." She felt this would assist her to get a job elsewhere and in obtaining a separation slip.

(c) Cagle made an unconditional application for re-employment in September 1970.

18. Nelson Rushing

(a) Nelson Rushing was the senior man in the pressing department, having been with the Company at Decaturville since the plant opened in 1960. When Lloyd Anderson became plant manager in 1969, inspection began to be tightened up and quality control procedures were made more stringent. Rushing was in the hot head pressing section with some 12 or 13 other pressers. After Anderson took over, Rushing also observed that there were changes in rates effectuated, and more pants were being returned out of bundles completed for re-pressing. Rushing had performed just about every function at one time or another in the pressing department.

(b) Because of the changes being effectuated and general dissatisfaction with them, Rushing became involved in Union activities, and there was considerable discussion taking place in the pressing department during the break and lunch periods about unionization, during 1969 and in 1970.

(c) Rushing was unhappy, because he was a production worker, when in 1969, pants that needed re-pressing were returned marked in bundles and had to be separated or pulled out of the bundles by the presser. Complaints were made to supervisors but Rushing felt little was being accomplished about these grievances, although at one time he and other pressers had a discussion with Anderson about the situation. The effect of these practices, according to Rushing, was to lower his production pay, and he

did not like the changes. He felt that the former plant manager, Rindone, had been more understanding, easier to get along with.

(d) In 1969, Rushing and other pressers initiated a work stoppage, which apparently called attention to their complaints and brought Rindone's attention to their grievances. Shortly thereafter in 1969, after Anderson became manager, however, another work stoppage resulted in a warning from Anderson that if it occurred again, the participants would be discharged.

(e) In 1970, inspection became tighter, and some pants approved by Henley, the pressing supervisor, were returned by quality control inspectors down the line for re-pressing. The Company adopted a policy of requiring all bundles which contained three improperly pressed garments out of any ten selected at random to be returned to the employee who had pressed the defective garments. Such employee was then required to inspect the bundle and make such corrections or repairs as were necessary. After Lloyd Anderson became plant manager, this policy was applied more consistently and uniformly to all pressers under more stringent quality control requirements.

(f) During the morning of June 23, 1970, supervisor Henley inspected a bundle of 60 to 80 slacks which were recently pressed by Nelson Rushing, a topper, and his legger, Milton Moore. Henley returned several pairs to Rushing for repressing. Henley returned to Rushing's station shortly before

the pressers' morning break and indicated that there was a policy change so that if there were as many as three pairs of pants returned out of any bundle the presser would have to go and inspect through the entire bundle. Henley stated that he was advised of this rule by Ed Stevens, his supervisor. Rushing immediately protested, stating that the pressers were inspectors. Rushing then demanded that Henley check with other officials concerning this policy which would, he felt, reduce his production, and refused to do this work. Henley then turned to Moore, the legger, and asked him to inspect the bundle. Moore replied that he agreed with Rushing. Other pressers, Hancock and Cressing, objected also to this new procedure.

(g) Stevens, accompanied by Henley, came by Rushing's work area shortly thereafter inquiring about the trouble and Rushing advised that the situation needed to be straightened out since the pressers were now being asked to "inspect" bundles and they weren't going to do this. When Stevens stated that he could do nothing about the problem, Rushing responded that he "go discuss it with Anderson [and] find out what can be done." Pressers Hancock and Cressing approached Stevens and stated they agreed with Rushing. Stevens then advised the pressers that he would "go take it up with Anderson."

Shortly thereafter, Stevens returned and informed Rushing and the other pressers that Anderson wanted to see them in his office. Hancock stated that he did not want to go to the office since he had

been there before and had accomplished nothing. However, Hancock added that Anderson should come discuss it with the pressers. Stevens then left and most of the pressers went to the lunch room.

(h) Shortly after the break period began, Anderson appeared in the cafeteria accompanied by Stevens and Pollard, personnel director, and asked to see Rushing in his office. Rushing refused to go to the office because he said it concerned all of the pressers, and because he feared being discharged in private. Rushing persisted in his refusal to go to the office.

(i) I find that Nelson Rushing was discharged both for his concerted activity with others in the pressing department, which activity he initiated, but also for his public and adamant refusal to meet with the company plant manager to discuss the problem and complaint.

19. Other Pressers

(a) The findings with respect to Nelson Rushing are reiterated insofar as they involve and affect other pressers who were subsequently (or concurrently) involved.

(b) Prior to the beginning of the Union campaign in 1969 and 1970, the pressing department was composed of approximately 54 pressers and bundle boys under the supervision of Edward Stevens. The pressers, who worked in pairs, a "topper" and a "legger," had their work inspected to determine if any defects existed in the pressed garments. The

inspection function, until on or about June 23, 1970, was performed by quality control inspectors and pressing department supervisors. If any pair of slacks were found by a supervisor to be incorrectly pressed, he would return that pair to the presser involved for correction. If the quality control inspectors subsequently rejected certain pairs of pants the supervisor would bring those pairs back to the presser for repressing. Occasionally, the supervisor would return an entire bundle of slacks that the presser had worked on, which bundle would contain red tags or some other indicator, on those specific garments which needed repressing.

Subsequent to the commencement of the Union campaign on the Company's premises, some pressers became an active intra-plant force on behalf of the Union, a fact which was known or should have been known to management. Additionally, the pressers openly discussed the issue of unionization in the plant and had discussions on the subject during lunch time and break periods.

(c) Plant Manager Anderson, who assumed his position at approximately the same time the Union obtained access to Company premises, immediately began imposing changes in the working conditions and enforced prior procedures in this department not previously uniformly observed. One change involved the use of "snap hangers" rather than the ordinary clothes hangers they had been using. The pressers who were paid on the basis of a production rate were forced to adopt themselves to this change and their wages may have suffered as a consequence.

Additionally, the pressers began receiving more slacks back for repressing from quality control. The pressers were not paid on a production basis for any repressing work they would be called upon to perform. Some pressers determined they were unhappy about their working conditions, since they were suffering losses in their pay and as a result, the pressers began voicing their grievances to their immediate supervisors and to Anderson, including a complaint about too stringent inspections.

(d) I find that there was a history of tighter controls imposed and enforced by Anderson and consequent employee complaints in the pressing department stemming from approximately the time that Anderson assumed his duties as plant manager.

(e) After the episode on June 23, 1970, in which Nelson Rushing refused to do certain repressing and/or inspection work, and also refused to meet with Mr. Anderson privately, most of the pressers then and there expressed support of Rushing and dissatisfaction with the decision to fire him.

(f) One presser, Hancock, then asked Anderson if he really meant "to fire him [Rushing] over this?" Anderson reiterated that Rushing was indeed discharged. Hancock offered that "we could work out something about [this incident and] get back [to the department] and make some kind of production." Anderson, however, rejected the offer stating, "I'm not making any deals." Hancock and the others responded to the effect that if Rushing were fired, then "the whole bunch" might as well be fired.

(g) All of the pressers then followed Anderson to the office and were given their final checks and their termination slips which reflected that they were being discharged for insubordination. I find that the Company discharged approximately 54 other employees besides Rushing working in the pressing department on June 23, 1970, because they collectively protested the discharge of Nelson Rushing and refused to receive work under the conditions in existence in the pressing department.

C. General Findings of Fact—Background and Supplementary

1. Marlene Industries has strenuously resisted I.L.G.W. Union efforts to unionize its employees, particularly at the Decaturville, Tennessee plant since 1965. Some of the zealous steps taken to effect this purpose were contrary to the requirements of the N.L.R.A. and were found both by the National Labor Relations Board and this Court to have overstepped the bounds of both propriety and legality. In 1969, this resulted in the Union's being given broad access to Company parking lots, bulletin boards, and resulted in other affirmative relief in favor of the Union and its organizational activities. Albeit under protest and reluctantly, the Company has not interfered with the Union or the employees in connection with Union access and availability on Company premises under these orders.

2. Prior to 1969, Raymond Rindone had been plant manager at Decaturville. He was discharged

in mid-1969 for activities that involved embezzling Company funds, maintaining false payroll records, and other related activities. These and other illegal activities of Rindone came to the attention of this Court upon an indictment of Rindone charging federal tax violations, to which Rindone plead "nolo contendere."[5] The pre-sentence report indicated, among other things, without being specific, evidence of Mr. Rindone's "special relationship" with a number of females in the Decaturville community.

3. Mr. Rindone's administration of the Decaturville plant was not marked by uniform supervision and control with regard to policies and procedures enforcing quality control and plant discipline. His successor, Lloyd Anderson, imposed Company-wide procedures, unpopular with production employees, designed to increase both quality and quantity of production and plant efficiency. Employees in a number of departments complained about these new procedures, rates and scales of production pay, and enforcement of disciplinary policies, some of which had not been previously enforced, or at least, not uniformly enforced prior to 1969.

4. During 1966 and subsequent years, Marlene Industries was again charged with unfair labor practices in connection with its activities at another plant, but the charges were not sustained.[6] At this time

[5] See cause No. 9276, United States District Court, Western District of Tennessee (Eastern Division).

[6] 171 N.L.R.B. #118 (1968). See also 183 N.L.R.B. #127 (1970) and 184 N.L.R.B. #82 (1970).

it was evident that the Union was continuing its organizational activities. Until June 23, 1970, in any event, the Union was actively and continuously, with the assistance of its professional organizers, attempting to organize the Decaturville plant.

5. Immediately after Nelson Rushing and the other pressers walked out of the Decaturville plant on June 23, 1970, picketing began at this plant with active assistance of Union agent D. O. Warren, who was then in the Company parking lot. The pressers informed Warren that they had all been discharged due to their adherence with Nelson Rushing's position. Warren stated that they would receive the Union's support if they wanted it, however, he asked them to be patient, as far as a course of action was concerned, since he would have to check with Union headquarters. Warren then met with Mary Cameron, the Union's Tennessee State Director, and informed her of what had taken place.

Cameron in turn contacted her superior, Nickolas S. Banano, the Union's Southeast Regional Director for organizing. Cameron advised Banano, that one of the pressers, Union adherent (Rushing) had been fired and that the other pressers in the department had walked out in sympathy with him. Based upon Cameron's report, Banano directed her to offer the Union's assistance to the employees and to indicate that the walk-out was in the nature of an unfair labor practice strike. After conferring with the Union's legal Staff, Banano placed another call to

Cameron with respect to ceasing organizational activities among the Company's employees.

6. Based on the instructions of his superiors. Warrent, on the afternoon of June 23, established a picket line at the Decaturville plant and distributed picket signs which contained the following wording:

> "On Strike Against Marlene Industries, for Unfair Labor Practices, Workers of Marlene International Ladies' Garment Workers' Union."
>
> "We Support the Workers at Marlene Industries Workers Against Unfair Labor Practices, International Ladies Garment Workers Union."

Later the same day, a meeting of approximately 50 to 60 striking employees was held at which time Warren outlined the Union's strike benefits and discussed picketing and strike procedures and violence on the picket line was sought to be avoided.

On or about June 30, Banano met with approximately 60 to 70 striking employees and explained the Union's position in support of the strike. He outlined strike benefits and advised that organizational activities were not to continue as performed previously. Banano explained that the Union was claiming that the reason for the strike was the Company's unfair labor practice in discharging Rushing and the other pressers on June 23. Subsequently, during the second week of July, Union attorney David Goodman met with the striking employees and also discussed the reasons for the strike with them. Some handbills were distributed thereafter advising em-

ployees of the status of the strike, and some solicitation of cards and other organizing efforts continued, but the emphasis after June 23, 1970, was on the strike and picketing. The wording of the picket signs remained the same throughout the course of the strike.

7. On June 24, 1970, the Company addressed a letter to each of the pressers and bundle boys, except Nelson Rushing, who had been discharged on June 23, 1970, and offered them full and immediate reinstatement of their position, without loss of seniority or any other privileges provided they reported for work by a specified time. Some of the pressers returned to work; others did not and continued to picket outside the Decaturville plant. Similar letters were sent to other employees who subsequently quit to join the picket line.

8. Although the Union hierarchy made efforts to characterize and to confine the strike at Decaturville as one for alleged unfair labor practices, there were continued, although somewhat spasmodic, attempts to organize and to recruit further workers into the I.L.G.W. Union. Some Decaturville strikers were sent to other Marlene plants by the Union in support of picketing at these other plants.

9. Those striking employees who left work and joined the strike on or after June 26, 1970, were written a letter by Anderson directing them to return to work by a deadline date. Anderson testified that those employees who returned after the deadline specified in the letter were required to fill out new

employment applications, and return as new employees at the bottom of the seniority list. Anderson further testified that seniority played a part in layoffs, holiday and vacation pay.

I find that those employees who failed to return to work prior to the deadline specified in the Company's letter to striking employees were required to file new applications for employment and were treated as new hires.

10. Approximately July 15, 1970, Banano issued instructions to his subordinates who, at the time, were organizing employees at the Company's other Tennessee, South Carolina and Alabama plants, to establish picket lines at those plants in support of the strike of employees at the Decaturville plant. Some or most organizational activities, as such, as those plants were also discontinued and picket lines were displayed at those locations with the same wording as displayed on the signs in Decaturville. No demands for recognition as employee bargaining representative have been made upon the Company at any time during the entire course of the Union organizing effort. I find that most of the Company's employees at Decaturville Sportswear Co., Inc., did on June 23, 1970, and thereafter strike in protest of the discharges of the employees of the pressing department at Decaturville Sportswear Company, Inc., and also in support of the Union's organizational efforts there.

D. Conclusions—Decaturville

1. This Court has jurisdiction over the subject matter and the parties in this action.

2. Regarding all of the wage increases alleged in the petition, as amended, the Petitioner failed to sustain its burden of proof that these wage increases violated either the National Labor Relations Act or the decree of this Court. See *N.L.R.B.* v. *Cleveland Trust Co.*, 214 F.2d 95 (6th Cir. 1954). See *Hagopian* v. *N.L.R.B.*, 395 F.2d 947 (6th Cir. 1968), wherein it was held that it must be shown that the benefits were granted to discourage a union organization effort. It was established that the granting of the wage increases was part of an established practice, grounded upon legitimate and substantial economic justifications that were essentially uniform in character. There was insufficient evidence establishing in a clear and convincing manner that the granting of these wage increases had any adverse effect upon the Section 7 rights of the employees of the Company or that the wage increases were granted primarily as a result of anti-union motivation by the Company. A part of the increases granted were as a result of minimum wage requirements. I conclude that the Company violated neither the National Labor Relations Act nor the decree of this Court in granting these wage increases. *Louisburg Sportswear Co.* v. *N.L.R.B.*, 462 F.2d 380 (4th Cir. 1972); *Hagopian & Sons, Inc.* v. *N.L.R.B.*, *supra*; and *Jervis Corp.* v. *N.L.R.B.*, 387 F.2d 107 (6th Cir.

1967). I further conclude that the raises did not interfere with employees in the exercise of their rights to self-organization.

3. Company policies regarding increased quality control and inspection requirements in the pressing department, as well as in other departments, coincided with the administration of the Decaturville plant under its new manager, Lloyd Anderson, beginning in 1969. Profits were not as good as in prior years; problems had been encountered with the previous plant manager, Rindone. This policy was grounded upon legitimate and substantial economic justifications, and resulted in an increase in the quality of the work at the Decaturville plant. There was insufficient evidence that this policy constituted an unfair labor practice; they were not "inherently destructive," and did not violate the Court's decree. *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 32 (1967). (See particularly, Judge Harlan's dissent).

4. The Company did not discourage Union membership nor engage in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, nor violate this Court's decree, by discriminating against, intimidating, or discharging Maria Stanfill, Betty Williams, Benson Rushing, Martha Thomas, Ruth Bradley Campbell, Lois T. Page, or Evelyn Phillips.

5. The Company did not unlawfully nor in violation of this Court's decree interrogate as to union activity or sympathy, or put under surveillance, Maria

Stanfill, Betty Williams, Martha Thomas, Doris Thorp, Ruth Bradley Campbell, Nellie Mills, Paulette Rushing, Lois T. Page, or Evelyn Phillips. *Jervis Corp.* v. *N.L.R.B.*, *supra*, and *N.L.R.B.* v. *Dale Industries*, 355 F.2d 851 (6th Cir. 1966).

6. R. C. Brashers was discharged, at least in substantial part, by reason of his union activity and this conduct constituted an unfair labor practice. Under the circumstances, I also find that it violated (a) of the Court's decree in respect to Brashers.

7. Maria Stanfill, Betty Williams, and Linda Williams were interrogated concerning their or other employees' union organizational activities and/or their union opinions contrary to Section (j) of the Court's decree. The nature of the interrogation, however, was not such conduct that also amounted to a violation of other portions of the Court's decree with respect to threatening employees, warning or coercing them. *Southwire Co.* v. *N.L.R.B.*, 383 F.2d 235 (5th Cir. 1967), *Suprenant Mfg. Co.* v. *N.L.R.B.*, 341 F.2d 756 (6th Cir. 1965).

8. The Company did discriminate against and refuse to re-hire Benny Hamm and R. C. Brashers because of their Union activity and adherence, and the fear that they would continue such activity while on the Company payroll.

9. The Company did refuse to hire Donald Pettigrew primarily because of a fear that he would join the picketing and the strike then in progress at the plant.

10. While there was substantial evidence to show that the Company refused to re-hire Ruth Bradley Campbell, Evelyn Phillips, Judy Scott Maness and Peggy Cagle because of their Union proclivities, there was also substantial evidence to show other sound and justifiable business reasons for the decision not to take these employees back. Both Campbell and Phillips had poor previous records and were serious employment risks either from a health standpoint or for production or attitude reasons. Both Maness and Cagle had quit to join the strike (for differing reasons) and refused immediate reinstatement or to communicate with the Company within a prescribed period in which replacements were sought and accepted. I would conclude that appropriate relief, if any, should be limited to re-hiring as and when a next available opening were determined to exist at a comparable position to that held at the time of termination. I do not constitute such refusal to re-hire these four employees as an intentional or deliberate violation of the Court's decree as to these employees. *N.L.R.B.* v. *Ogle Protection Service*, 375 F.2d 497, 505 (6th Cir. 1967) and *Tompkins Motor Lines* v. *N.L.R.B.*, 337 F.2d 325, 330 (6th Cir. 1964).

11. Because of the circumstances of his conduct on June 23, 1970, employee Nelson Rushing was insubordinate and, accordingly, was discharged for just cause, even though Rushing was also protesting what he believed was unfair. The Company's actions surrounding his discharge were not shown to have been prompted essentially by any anti-union considerations. The discharge of Nelson Rushing, therefore, constituted neither an unfair labor practice nor a violation of the decree of this Court.

12. The remaining pressers were not justified in their demands that Rushing be reinstated or rehired by plant manager Anderson on June 23, 1970, before they would return to work. These pressers were not discharged by the Company unreasonably under the circumstances, despite anti-union sentiment on the part of the Company.

13. If, however, the Company acted improperly, unlawfully or unreasonably in discharging the pressers other than Nelson Rushing on June 23, 1970, for engaging in a concerted work stoppage, they should not now in equity be entitled to reinstatement since the Company offered to them full reinstatement on June 24, 1970, by letter which most chose to ignore or to decline. The offer of the Company was a bona fide effort to reinstate. If accepted, the pressers on strike would not have sustained any diminution in seniority, earnings, or any other privileges which they enjoyed prior to their termination. All employees who went out on strike in protest of Rushing's discharge, claiming such to be an unfair labor practice, were in fact economic strikers as well as unfair labor practice strikers. *AHI Machine Tool & Die, Inc.* v. *N.L.R.B.*, 432 F.2d 190 (6th Cir. 1970); *LTV Electrical Systems, Inc.* v. *N.L.R.B.*, 408 F.2d 1122 (4th Cir. 1969). It has been concluded that Nelson Rushing's discharge was not an unlawful or unfair labor practice under the circum-

stances of insubordination. His actions were disruptive of order and discipline. *Hagopian & Sons*, v. *N.L.R.B.*, *supra*. Although the other pressers were upset about the new and changed procedures in their department, they walked off their jobs primarily in sympathy with Rushing. Theirs was a concerted protest as well, however, involving working conditions, but it was not because the Company had illegally discharged Rushing but, rather because Rushing was fired regardless of its illegality, and because of their frustration over working conditions. The Union attempted to make the strike an unfair labor practice strike rather than an economic one. This strike instigated by the pressers has connotations of concerted activity protected by the National Labor Relations Act, and was activity within the broad purview of the National Labor Relations Act, though the strike also was essentially economic in its nature, because the imposition of stricter quality control procedures has also been concluded not to have been an unfair labor practice.

14. In summary, with respect to the pressers, it is concluded:

(a) the imposition of tighter quality control procedures was not an unfair labor practice nor violative of this Court's decree.

(b) Nelson Rushing's actions in protesting the new quality control procedures also amounted to insubordination in his public and adamant refusal to discuss his grievance privately with or to obey

reasonable orders of the plant manager; therefore, discharging him was not an unfair labor practice nor violative of this Court's decree.

(c) the quality control procedures involved did involve working conditions in the plant.

(d) the action of the other pressers in walking off in support of Rushing was concerted activity involving both working conditions and protest over a lawful firing. *N.L.R.B.* v. *MacKay Radio Co.*, 304 U.S. 333 (1938), *N.L.R.B.* v. *Phaostron Instrument Co.*, 344 F.2d 855 (9th Cir. 1965), and *Hagopian & Sons* v. *N.L.R.B.*, *supra*.

15. It was not an unlawful or unfair labor practice, nor one violative of this Court's Orders for the Company to replace striking employees with others in an effort to carry on its business. Nor is the Company bound to discharge those hired to fill the places of strikers upon their subsequent election to resume their employment. The Company should therefore only be required to replace those unconditionally seeking reemployment having abandoned the strike as and when there were vacancies. This, I conclude, is all that the Company should be required to do with those strikers (pressers and others) who had not otherwise been terminated for just cause (such as Ruth Campbell) and who did seek re-employment (as Cagle and Maness). *N.L.R.B.* v. *MacKay Radio Co.*, 304 U.S. 333, 345-6 (1938) and *Kellog Co.* v. *N.L.R.B.*, 457 F.2d 519 (6th Cir. 1972).

16. Liability in civil contempt proceedings, such as this one, should be established only upon a show-

ing of "clear and convincing evidence," that respondent has engaged in contemptuous conduct violative of the Court's decree. *N.L.R.B.* v. *Local 5881 UMW*, 323 F.2d 853 (6th Cir. 1963) and *N.L.R.B.* v. *Lynair, Inc.*, 380 F.2d 286 (6th Cir. 1967).

17. We have found "clear and convincing evidence" of violation of the Court's order by respondent with respect only to discrimination or misconduct in the particulars specified. The Board has failed to sustain its contentions, except as indicated, as to Maria Stanfill, Betty Williams, Benson Rushing, Martha Thomas, Doris Thorp, Ruth Bradley Campbell, Nellie Mills, Paulette Rushing, Lois T. Page and Evelyn Phillips. It has sustained only those portions of its charges of civil contempt with respect to R. C. Brashers, Bennie Hamm, Donald Pettigrew, Linda Williams, Judy Maness (in part), and Peggy Cagle (in part). The Nelson Rushing episode and the pressers' walkout have been discussed separately.

II. Trousdale, Tennessee Plant

A. Wage Increases

1. Marlene's plant at Trousdale was charged by the Board with granting wage increases in violation of Section (d) of this Court's cease and desist order, the pertinent language of which has heretofore been set out at page two.

2. The Company[7] granted a wage increase to hourly rated employees on or about July 14, 1969, January 12, 1970 and July 1, 1970. The base rate for production or time workers was increased also from $1.75 to $1.85 per hour in January 1970, and again to $2.00 per hour in July, 1970. From time to time, the Company at somewhat regular intervals had previously granted similar wage increases, some of which were necessary to comply with minimum wage statutory increases. Base rates were attempted to be maintained at higher than minimum wage scales as was the case at Decaturville. Approximately 75% of the employees were maintained at rates higher than minimum wage by reason of the periodic increases and adjustments.

3. At the Company's Trousdale Manufacturing Co., Inc. plant in Hartsville, Tennessee, a wage increase was granted effective July 14, 1969, to 104 hourly-rated employees, normally in a ten cent increment in accordance with general past practices of the Company.

4. On July 13, 1970, 155 hourly-rated employees at the Trousdale plant were granted wage increases in amounts varying from five cents to fifteen cents per hour, and the base rate for piece-rated employees was increased from $1.75 to $1.85 per hour.

5. On or about July 25, 1970, at its Trousdale plant, the Company granted twenty-six of its em-

[7] "The Company" refers here to Trousdale Manufacturing Company, a wholly owned subsidiary of Marlene Industries Corporation.

ployees wage increases in increments ranging from five cents per hour to twenty-five cents per hour and, in addition, increased the base rate for piece-rated employees from $1.85 to $2.00 per hour.

6. The plant manager at Trousdale during the period of these increases was Dan Miller who terminated his employment with Trousdale in 1971. He was not available to testify, but he approved the three increases made, and furnished the list by which the payroll clerk effectuated these increases.

7. The Union was actively attempting to organize the Trousdale facility during 1969 and 1970, and Union organizers were present to assist in this activity. In 1969 and 1970, Marlene's profits were down from prior years.

8. I find that there is not sufficient evidence upon which to infer or to determine that these wage increases were granted to defeat the organizing efforts of the Union rather than to conform to past practice and experience.

B. Cole-Robinson Incident

1. Robert Cole was general manager for Marlene, being general supervisor and superior over Dan Miller, the plant manager, at Trousdale. The I.L.G.W. Union began to picket this plant in July 1970, purportedly as a follow through and in broad protest to alleged unfair labor practices at Decaturville.

2. Burle Robinson was an experienced Union organizer for I.L.G.W. Union assisting in the picketing and the strike at the Trousdale plant. He had been

at Trousdale since January 1969, trying to organize there.

3. During the late afternoon on or about August 19, 1970, Robinson was on the picket line nearby where Cole was sitting in an automobile photographing the activity. Mutual recriminations for a few moments passed between the two wherein Cole accused Robinson of threatening employees about what the Union was going to do. At the same time Cole appeared to threaten Robinson about his role in the ongoing strike. No blows were struck, and Cole denied that he was "threatening" Robinson in the encounter, according to a witness who was asked by Robinson to take a note of what Cole was doing. Cole is no longer with Marlene and was not present to testify.

4. Both Cole and Robinson paid minor fines in a civil proceeding resulting from this episode.

5. I find that there is insufficient evidence to support the Board's charge that this conduct of Mr. Cole amounted to any such threat, coercion, or intimidation as prohibited by the Court's Order or by the National Labor Relations Act under the meager circumstances adduced in proof.

C. Conclusions

1. This Court has jurisdiction over the subject matter and the parties in this action.

2. The Court's conclusion is that none of the Company's acts at Trousdale under the circumstances, adduced by the proof, sustain the National Labor

Relations Board's charges of interference, restraint or coercion in respect to the employees' rights to self-organization.

3. Only one employee or former employee of The Trousdale plant appeared in support of these charges, and he was a striking employee, and his conduct and union activities were in no way effected or shown to have been influenced adversely by Company activities at Trousdale.

III. Westmoreland, Tennessee Plant

A. Wage Increases

1. The same part of the Court's cease and desist order referred to in IA 1. and IIA 1. is applicable to the wage increases granted at Westmoreland.

2. The Company[8] granted, on or about July 14, 1969, at its Westmoreland Manufacturing Corporation plant, a wage increase to three of its employees in accord with its general past practices.

3. On or about January 24, 1970, the Westmoreland plant granted wage increases to twenty-seven of its hourly-rated employees in amounts varying from five cents to twenty cents per hour.

4. On or about July 25, 1970, at its Westmoreland Manufacturing Corporation plant, the Company granted wage increases to thirty-three of its hourly-rated employees in amounts ranging from ten cents

[8] "The Company" refers here to Westmoreland Manufacturing Corporation, a wholly owned subsidiary of defendant Marlene Industries Corporation.

to twenty cents per hour and in July 1970, the Westmoreland Manufacturing Corporation plant advanced the base rate for piece-rated employees from $1.85 to $2.00 per hour.

5. The I.L.G.W. Union had actively pursued an organizational campaign prior to July 1969. Wage increases had periodically been granted at this plant from 1962 to 1969 both before and during Union organizational efforts. The wage increases granted were similar in character to those previously awarded, and in some instances were required to bring wages in compliance with minimum wage standards, or by reason of necessary adjustments to wage or rate scales because of minimum wage requirements.

6. From approximately 1965 through 1971, the practice at Westmoreland had been generally for the plant manager to review earnings and wages of employees in most categories twice a year. The plant manager would then forward his recommendations with respect to wage adjustments to corporate executives and his supervisors at Marlene Industries. Increases granted have brought about proportionately more raises to hourly workers than to production workers on production scales. Practices at Trousdale and Westmoreland plants have been related and generally similar over the years in question. Final decisions about wage adjustments and increases have always been made at Marlene Industries' offices.

7. Picketing began by the Union at Westmoreland on July 16, 1970, and continued to the date of these hearings.

B. Conclusions

1. Petitioner, National Labor Relations Board, has failed to sustain its burden of proof that these wage increases at Westmoreland violated either the National Labor Relations Act or the decree of this Court. Rather, the evidence indicated that the increases in question were grounded upon legitimate economic justification and were in accord with past practices.

IV. RECOMMENDATIONS

A. The special master recommends that Marlene Industries Corporation, Decaturville Sportswear Company, Inc., Trousdale Manufacturing Company and Westmoreland Corporation be required to continue to comply fully with and obey this Court's judgment and decree of January 29, 1969.

B. R. C. Brashers should be offered immediate and full reinstatement to his former or substantially equivalent position at Decaturville without prejudice to his seniority as of August 18, 1969.

C. Benny Hamm should be offered immediate and full reinstatement to his former or substantially equivalent position at Decaturville without prejudice to his seniority as of June 15, 1970.

D. Donald Pettigrew should be offered a position at Decaturville equivalent to that made available to others applying for employment with him in the pressing department as of June 23, 1970.

E. R. C. Brashers, Bennie Hamm and Donald Pettigrew should be made whole after supplemental

proceedings have been held by the Board to fix a reasonable amount necessary to reimburse said employees, taking into account any mitigating factors, for any losses sustained by reason of Decaturville's failure to employ or re-employ them.

F. Decaturville supervisors should be required to be instructed and cautioned in writing that they may not question or interrogate or interfere with any present or prospective employee with respect to his or her union interest, membership or activity.

G. Decaturville should be required to post a notice on all its bulletin boards for a period of sixty (60) days with a copy to the local President and Secretary of the local I.L.G.W. Union, signed by its plant manager, stating the basic provisions and effects of the Court's order of purgation, if it is held to be in civil contempt, and setting forth that it will affirmatively henceforth not interrogate, lay off, discharge or refuse to re-hire employees because of lawful concerted or Union activities, or otherwise in any other manner interfere with, restrain or coerce employees in the exercise of their protected activities. Further, such posted notice shall be placed conspiciously and maintained in a clearly legible condition for said consecutive sixty (60) day period.

H. Peggy Cagle and Judy Maness should be offered a position at Decaturville comparable or substantially equivalent to the positions held by them at their termination when they engaged in concerted activity during June 1970. Said reinstatement should be conditional, however, upon the first availability of

such a position at Decaturville. When and as said Cagle and Maness are reinstated, they shall retain their seniority as of September 8, 1970.

I. Upon request by the I.L.G.W. Union, Decaturville should immediately grant said Union and its representatives reasonable access, for a six month period, to plant bulletin boards.

J. Decaturville employees should be permitted to have reasonable access to said Union organizers during non-working time only at plant approaches and Decaturville parking lots for a period of six months from the issuance date of contempt judgment, if any, subject, however, to reasonable Company regulations in the interests of plant efficiency and discipline.

K. Decaturville should be required at its expense to publish in form to be approved by the National Labor Relations Board in newspapers of general circulation in Decatur County, Tennessee, the essential terms and provisions of the Court's order, once a week for four consecutive weeks, at a reasonable time designated by the Board.

L. All other employees of the Decaturville plant who engaged in concerted activity beginning in June 1970, assertedly protesting unfair labor practices or conditions, and who have made unconditional application for reinstatement or re-employment shall be offered substantially equivalent positions with restoration of seniority rights to the date of their termination in June 1970, (but not during the period of strike prior to unconditional application for reinstatement). Such reinstatement or re-employment shall, however, be made only as and when such positions become available, taking into account the seniority positions and status of such re-applying employees.

M. Decaturville should be required to file a sworn statement with the Court within 20 days after any adjudication of contempt, and again after the posting and/or publishing period specified in G and K showing what specific steps have been taken to comply with the Court's directions and orders.

N. Decaturville should be required to pay all costs and out-of-pocket expenditures incurred by the National Labor Relations Board in connection with investigation and hearing of these proceedings relating to Decaturville only.

O. That the Court take such other and further action and grant such other and further relief as may be deemed just, reasonable and proper in respect of the findings, conclusions and recommendations herewith submitted as to Decaturville, Trousdale and Westmoreland plants.

Respectfully submitted,

/s/ Harry W. Wellford
Special Master

Date: 10-5-73

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 18,064
18,154
18,249
18,250
18,256

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

DECATURVILLE SPORTSWEAR CO., INC., ET AL.,
RESPONDENTS

MEMORANDUM

On or about October 5, 1973, as Special Master, findings, conclusions and recommendations were issued in these causes on proceedings involving National Labor Relations Board charges of civil contempt against respondent in respect to its three Tennessee manufacturing plants (at Decaturville, Trousdale and Westmoreland). Reference is made to these findings, conclusions and recommendations as they may bear upon similar charges in these cases with respect to two South Carolina manufacturing plants and the Alabama plant, Frisco Sportswear, referred to herein as Loris, Aynor and Frisco. The Special Master conducted hearings at Florence, South Carolina, in connection with the charges involving the South Carolina plants and at Mobile, Alabama, with respect to the Alabama plant. For specific reference

to the underlying decree of the Court of Appeals for the Sixth Circuit, see 406 F.2d 886 (6th Cir. 1969) and the previous findings and conclusions hereinabove referred to.

V. LORIS PLANT

A. Newspaper article findings

1. The International Ladies' Garment Workers' Union, AFL-CIO, (herein called "the Union"), has been attempting to organize the Company's employees at its Tennessee, South Carolina and Alabama plants since 1965. During the summer of 1969, the organizing campaign was intensified as a result of the Court's decree, which afforded the Union access to the Company's parking lots and bulletin boards in furtherance of the Union's organizational efforts. The *Loris Sentinel*, which appears in the plants, is a weekly newspaper with circulation in the geographic area in which the towns of Loris and Aynor, South Carolina, and the Loris and Aynor plants are located. Prior to the period in question, the *Loris Sentinel* was customarily found in a newspaper rack located in the lobby next to the personnel office of the Loris plant. The rack, although located near an entrance, was not the entrance normally used by employees in entering and leaving the plant.

During the summer of 1969, as the Union's organizational drive intensified on several occasions, employees observed copies of this paper on tables in the plant cafeteria. These editions, read and discussed by employees, warned that success by the Union in its

campaign would be destructive to the local economy—would take workers "down the road to disaster" and would bring chaos, loss of income and industry, as well as strife to the community. The newspaper also urged employees who had signed Union authorization cards to revoke them and offered suggestions about withdrawing from the Union. Previously, employees had not observed copies of the newspaper, except perhaps a casual few copies, in any area of the plant other than the newspaper rack in the lobby, and previously copies of the paper had not been free. A company official, Epstein, also observed editions of the *Loris Sentinel* in the cafeteria on several occasions during this period of time, but made no attempt to disavow the warnings of consequences pictured therein if the Union were successful. This official (nor any other) made no statement to employees concerning the papers hostile comments about the Union.

B. Wage Increases

1. The company granted a wage increase to 306 of its hourly-rated employees effective July 9, 1969. This wage increase varied in amount from five cents per hour to fifteen cents per hour. In the past, the company had from time to time granted wage increases of similar amounts to employees having the same or equivalent job classifications.

2. The company on or about January 2, 1970, also granted a wage increase to 270 of its hourly-rated employees. The increase it granted was generally in the amount of ten cents per hour. In addition, in January of 1970, the company advanced the base rate for piece-rated employees from $1.75 to $1.85 per hour. This increase in the base rate did not, however, result in a wage increase to all of the employees compensated on a piece-rate basis. Both the wage increase of ten cents per hour to the hourly-rated employees and the change in the base rate from $1.75 to $1.85 per hour were in accord with the company's practice of granting periodic wage increases and/or changes in the base rate and were motivated, at least in part, by its desire to retain its competitive position in the labor market in the Horry County, South Carolina area.

3. Herman Epstein, General Manager of all South Carolina plants in 1969, who subsequently became manager of the Loris plant in 1970, testified that increases were granted to employees every six months pursuant to past practice. Regarding the increases at the Loris plant, however, Epstein testified that there was no written criteria governing the granting of increases but that it was company policy. He had been directed to grant the increase in July, 1970, by his superior, General Manager Robert Cole, although Cole had not specifically advised him on the granting of increases previously. Epstein testified that the criteria for the increases, based on his own decision, was to bring employees up to employment "standards," considering "job evaluation" and giving employees a "living wage." Seniority played no particular part in granting the increases, although employee merit was a consideration.

4. On or about July 22, 1970, the company granted wage increases to 262 of its hourly-rated employees and increased the base rate for employees compensated on a piece-rate basis of ten cents per hour to the hourly-rated employees and the change in the base rate of $1.85 to $2.00 per hour were in accord with the company's past practice of granting periodic wage increases and/or changes in the base rate and were motivated, in part, by the company's desire to retain its competitive position in the labor market in the Horry County, South Carolina area.

C. Pressing Department Discharges

1. Delphine Reeves began her employment with Loris Manufacturing Company in February, 1968, and at the time of her discharge on March 23, 1970, was working as a bulk or form presser. Reeves signed a Union card in June of 1969, and a month later began wearing a Union badge in the plant. She was a member of the Union's in-plant organizing committee, and as such, solicited and obtained signed Union authorization cards from other employees and was an active Union adherent. Reeves had two separate conversations with Epstein, the plant manager, relating to her right to wear a Union button and Epstein's admonition that it did not give her any special privileges. Reeves' name appeared in a Union sponsored advertisement in the August 27, 1969 edition of the *Loris Sentinel*. The Company became aware of Reeves' Union activity in 1969, on or before her conversations with Plant Manager Epstein.

2. Postell Goff, Reeves' brother, began his employment with Loris in October of 1967, and was a presser at the time of his discharge. Goff signed a Union card in June of 1969, thereafter volunteered to be an organizer, and was active on the Union's behalf. Goff appeared on a Union sponsored radio program during this period. Goff's signature also appeared in the Union sponsored advertisement in the *Loris Sentinel*. The Company became aware of Postell Goff's Union activity in 1969.

3. On Friday, March 20, 1970, Charles Neeley, a supervisor in the pressing department at the Loris plant, requested Delphine Reeves and Postell Goff, pressers, along with sixteen other pressing department employees, to work five hours on Saturday, March 21, 1970. Work on Saturday was voluntary and was not considered overtime unless an employee had already worked forty hours prior to the commencement of Saturday work. Reeves and Goff agreed to work and reported at 6:55 Saturday morning, March 21, 1970. At approximately 10:00 A.M. on Saturday morning, March 21, 1970, Reeves and Goff, without permission from their foreman, Charles Neeley, left the pressing area; clocked out; and walked out of the plant. Neeley, a relatively new supervisor, contacted plant manager Herman Epstein and advised him of this development and requested instructions. Epstein told Neeley to notify Olin Roscoe, head of the pressing department, that Reeves and Goff had voluntarily terminated their employment by walking off the job without permission and that they were to be terminated on Monday, March 23, 1970. When

Reeves and Goff reported for work on Monday, March 23, 1970, they were taken by Roscoe and Neeley to the personnel office where Epstein advised them that they had walked off the job without permission and were considered by the Company has having voluntarily terminated their employment. Both employees protested to Epstein that Neeley had granted them permission to leave work early the previous Saturday.

Both Reeves and Goff had worked frequently on past Saturdays and had not refused the request of supervisors to do so. Both employees had on occasion requested an opportunity to leave early in the past and had been granted permission to do so without obtaining a sign-out slip. Both had good work records.

D. Refusal to Reinstate Strikers

1. The strike which began at the respondent Company's Decaturville, Tennessee plant on June 23, 1970, resulted in a strike on July 16, 1970, at the Company's Loris and Aynor, South Carolina plants, of employees who supported the striking employees at the Decaturville plant. Approximately two weeks after the commencement of the strike at Loris, employees Brice Todd, Robert Stephens and Robert Richardson left the plant and joined the strike. Subsequently, Plant Manager Epstein wrote letters to all the striking employees directing them to return to work by a specified date or be replaced. None of these three employees returned by the deadline. Thereafter, however, all three employees quit the strike, and in October of 1970, Todd, Stephens and

Richardson visited the plant and unconditionally offered to return to work. Epstein advised them that they had not returned by the date stipulated in the letter sent to them, that replacements had been hired, that the latter would not be discharged and that they would be returned to work as soon as a job became available. Subsequently, Richardson was rehired on November 7, 1970. Stephens was rehired on December 3, 1970. Todd was rehired late in October and was injured in November, 1970.

E. Conclusions

1. This Court has jurisdiction over the subject matter and the parties in this action as to Loris, a wholly owned subsidiary of Marlene Industries, Inc.

2. Although the issues of the *Loris Sentinel* contain antiunion articles which could be categorized as threats, evidence is lacking to establish that the *Loris Sentinel* or its editor were acting as agents of the Company. *NLRB* v. *Lake Butler Apparel Company*, 392 F.2d 76 (5th Cir. 1968).

3. During the summer of 1969, on several occasions, copies of the *Loris Sentinel*, containing the aforesaid warnings were made freely available to employees of Loris Manufacturing Company on plant premises. Employees could reasonably feel that the Company was utilizing the newspaper as a vehicle for or means of communication to its employees in predicting economic harm and even possible plant closure in the event of unionization. Under the circumstances, they could reasonably be regarded as

threats as well as honest predictions; that the Company took no substantial steps to disavow or disassociate itself from these newspaper account. The newspaper, however, was not a Company "agent" and enjoyed the freedom to predict even unreasonable consequences of unionization of the Company plant. The Company should have in some manner disavowed that it was in any way responsible for newspaper policy and opinion.

4. Whether the appearance of these editions of the newspaper in the Loris cafeteria was a violation of the Court's decree depends on the resolution of two issues. First, were the statements protected by the First Amendment and Section 8(c) of the Act or did they impermissibly interfere with, restrain and coerce employees in their protected right to join or assist the Union? Secondly, if the statements did so interfere and coerce, was the Company under any obligation to disavow them?

The test for determining whether statements are constitutionally protected or actionable violations was laid down by the United States Supreme Court in *N.L.R.B.* v. *Gissel Packing Company*, 575 U.S. 617 (1969) as follows:

> ". . . an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case,

> however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. * * *
>
> '. . . [c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of the closing is capable of proof'." (page 618)

The Company could have disavowed these grave newspaper predictions and advice to foresake the Union, and could have assured its employees that though it was opposed to the Union, it would not take action on its own initiative for reasons unrelated to economic necessities. The Company did neither, but neither did it attempt to adopt the newspaper opinions as its own. See *Amalgamated Clothing Workers* v. *N.L.R.B.*, 371 F.2d 740, 744 (C.A. D.C., 1966).

5. Regarding all of the wage increases alleged in the petition at Loris, the petitioner failed to sustain its burden of proof that these wage increases violated either the National Labor Relations Act or the decree of this Court. See *NLRB* v. *Cleveland Trust Co.*, 214 F.2d 95 (6th Cir. 1954) and *Hagopian* v. *NLRB*, 395 F.2d 947 (6th Cir. 1968). The granting of the wage increases was part of the Company's practice and was grounded in principle measure upon legitimate economic considerations. There was no evidence offered which establishes in a clear and convincing

manner that the granting of these wage increases had any substantial adverse effect upon the Section 7 rights of the employees of the company or that the wage increases were granted by reason of antiunion motivation. The Company violated neither the National Labor Relations Act nor the decree of this Court in granting these wage increases. *Louisburg Sportswear Co.* v. *NLRB*, 462 F.2d 380 (4th Cir. 1972); *Southern Foundation* v. *NLRB*, 446 F.2d 1063 (6th Cir. 1969); *Hagopian & Sons, Inc.* v. *NLRB*, *supra.*

6. Employees, Reeves and Goff, are given the benefit of doubt, consistent with their good records, that they would not have walked out of the Loris plant without any prior notice on March 21, 1970, or absent some misunderstanding about their leaving under all the circumstances. In any event, the Company's action in summarily discharging them, in light of their known Union activities and animus, indicates a disproportionately severe penalty under all the circumstances. Some disciplinary measure may have been indicated, but there is an inference that may be drawn that the harsh results may well have been prompted by anti-union considerations. This conclusion is drawn despite recognition that it is not the Court's function to substitute its judgment in the ordinary case for that of management. *NLRB* v. *Ogle Protection Service*, 375 F.2d 497 (6th Cir. 1967). *NLRB* v. *Berry Manufacturer*, 422 F.2d 748 (10th Cir. 1970) and *NLRB* v. *Stemum Mfg.*, 423 F.2d 737 (6th Cir. 1970).

7. There is insufficient clear and convincing proof establishing that picketing at the Loris plant was solely to protest an unfair labor practice. Both Todd and Stephens who joined the picket line admitted that they had walked out of the plant, without notice to the company and without making any effort to advise management of the nature of their grievances, if any. All "concerted activity" is not protected by Section 7 of the National Labor Relations Act. *AHI Machine Tool & Die, Inc.* v. *NLRB*, 432 F.2d 190 (6th Cir. 1970); *NLRB* v. *Sunbeam Lighting Company*, 318 F.2d 661 (7th Cir. 1963); *NLRB* v. *Blades Manufacturing Corporation*, 344 F.2d 998 (8th Cir. 1965). Todd and Stephens joined the pickets in front of the company's plant in Loris in an effort to get a union into the plant, as well as to protest what they considered unfair or unjust practices. They assumed a status of economic strikers who might be subject to permanent replacement under certain conditions. *NLRB* v. *MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *NLRB* v. *Wheatwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB* v. *International Van Lines*, 448 F.2d 905 (9th Cir. 1971). Since Todd and Stephens both admitted receiving letters from the company directing them to return within a reasonable time, by failing to return they rendered themselves subject to replacement. The company did, in fact, replace them and did not violate either the National Labor Relations Act or the Court's decree when they were not immediately reinstated when they applied for work on October 5, 1970. The company, within a

reasonably short period of time did rehire them. This action is not construed to constitute a violation of the Court's decree.

VI. Aynor Plant

A. Wage Increases.

1. On or about July 4, 1969, the company granted a wage increase to twenty-seven of its hourly-rated employees in amounts varying from five to fifteen cents per hour.

2. On or about July 7, 1970, the company granted wage increases to forty of its hourly-rated employees in amounts varying from five to twenty cents per hour. On or about January 2, 1970, the company advanced the base rate to piece-rated employees from $1.75 to $1.85 per hour.

3. On or about July 2, 1970 and July 22, 1970, the company granted wage increases to forty-eight of its hourly-rated employees. On or about July 22, 1970, the base rate for piece-rated employees was increased from $1.85 to $2.00 per hour.

4. The increases were not dissimilar to those granted periodically in prior years to employees in this plant. They also coincided with minimum wage increases during the applicable period.

B. Conclusions.

1. This Court has jurisdiction over the subject matter and the parties in this action with regard to

Aynor, a wholly owned subsidiary of Marlene Industries.

2. The petitioner failed to sustain its burden of proof that these wage increases granted by Aynor violated either the National Labor Relations Act or the decree of this Court. See the authority cited in the Loris conclusions in this respect. The wage increases were part of a practice having legitimate and substantial economic justification. These wage increases were not shown to have had any significant effect upon the Section 7 rights of the employees of the company. They were not shown to have been initiated as a part of any antiunion motivation by the company. It therefore follows, as a matter of law, that the company violated neither the National Labor Relations Act nor the decree of this Court in granting these wage increases. *Louisburg Sportswear Co.* v. *NLRB*, 462 F.2d 380 (4th Cir. 1972); *Southern Foundation* v. *NLRB*, 446 F.2d 1063 (6th Cir. 1969); *Hagopian & Sons, Inc.* v. *NLRB*, 395 F.2d 947 (6th Cir. 1968); and *Louis Allis Company*, 193 NLRB No. 8 (1971).

3. The wage increases at Aynor, as in the case of Loris, were small and not out of character with the relatively poor financial condition of these plants and Marlene Industries at the time.

VII. Recommendations.

A. The special master recommends that Marlene Industries Corporation, Loris Manufacturing Company, Inc. and Aynor Manufacturing Company, Inc.,

be required to continue to comply fully with and obey this Court's judgment and decree of January 29, 1969.

B. That Delphine Reeves and Postell Goff be offered immediate and full reinstatement to their former positions at Loris without prejudice to their seniority at March 21, 1970. (The company, however, should be recognized as having a reasonable right to discipline these employees for their early departure from the plant on that date).

C. Loris and Aynor should be enjoined from furnishing free copies to employees of antiunion newspaper articles or issues at these plants and should be required to disavow in the local newspaper and on its bulletin boards the implications and statements made in the newspaper articles filed as exhibits at the hearings before the special master in this cause.

D. Upon request by the I.L.G.W. Union, Loris and Aynor should immediately grant said Union and its representatives reasonable access, for a six month period, to plant bulletin boards.

E. Loris and Aynor should be required at their expense to publish in form to be approved by the National Labor Relations Board in newspapers of general circulation in the area of these two plants, the essential terms and provisions of the Court's Order, once a week for four consecutive weeks, at a reasonable time designated by the Board.

F. All other employees of the Loris and Aynor plants who engaged in concerted activity beginning in June 1970, assertedly protesting unfair labor prac-

tices or conditions, and who have made unconditional application for reinstatement or reemployment shall be offered substantially equivalent positions with restoration of seniority rights to the date of their termination in June 1970, (but not during the period of strike prior to unconditional application for reinstatement). Such reinstatement or reemployment shall, however, be made only as and when such positions become available, taking into account the seniority positions and status of such re-applying employees.

G. Loris and Aynor should be required to file a sworn statement with the Court within 20 days after any adjudication of contempt, and again after the posting and/or publishing period specified above, showing what specific steps have been taken to comply with the Court's directions and orders.

H. Loris should be required to pay all costs and out-of-pocket expenditures incurred by the National Labor Relations Board in connection with investigation and hearing of these proceedings relating to Loris only.

I. That the Court take such other and further action and grant such other and further relief as may be deemed just, reasonable and proper in respect of the findings, conclusions and recommendations herewith submitted as to Loris and Aynor.

VIII. Frisco

A. Reinstatement of striking employees.

1. The strike of employees which began at the company's Decaturville, Tennessee plant on June 23, 1970, and subsequently spread to its other Tennessee and South Carolina plants, also precipitated a strike on or about July 15, 1970, of the company's employees at its Frisco City, Alabama, plant, in support of the striking employees at the Decaturville plant. On approximately July 31, 1970, Frisco City employee Randy Montgomery left the plant and joined the strike then in progress. Employee Sandra Matchett joined the strike on August 7, 1970. Subsequently, plant manager Virgil Boen wrote letters to all striking employees, including Montgomery and Matchett, directing them to return to work by a specified date, or be replaced. Neither Montgomery nor Matchett returned by the deadline specified in the letter. Thereafter, Matchett, on November 28, 1970, and Montgomery in early July 1971, quit the strike and returned to the plant unconditionally offering to return to work. Matchett met with plant manager Boen who advised her that he had no openings for her and that, citing the letter which he had sent to her, stated that he had given her a chance to return but that she had refused. Montgomery, who had spent approximately one year on the picket line was told by Boen, upon returning to the plant, that there were no openings. The company refused immediate reinstatement to both Matchett and Montgomery. Neither employee was subsequently reinstated. Boen testified that no other striking employees had offered to return to work. Neither Matchett nor Montgomery returned to seek employment but the one time.

2. The picketing began at the Frisco plant on July 14, 1970, when a group of individuals who had not been previously employed at the Frisco plant appeared outside with picket placards and began picketing. The picketing by these nonemployees of Frisco continued from July 14 until July 31, 1970, when Wayne Jay, Steve Smith and Phillip Baggett, Frisco employees, came by Boen's office and stated that they were walking out because "they wanted more money". At the time the picketing began on July 14, 1970, the Frisco plant employed approximately 400 employees. After picketing began on July 14, 1970, a total of 42 employees of the Frisco plant walked out and joined the picket line.

3. Immediately prior to his joining the strike at approximately 12 noon on July 31, 1970, employee Randy Montgomery testified that his supervisor, Ward Bixler, told him that those employees who "walked out" would never work in there no more." If Bixler made this statement, it did not coerce or effectively influence Montgomery's decision to commence picketing and later to request reinstatement. Bixler denied the statement.

4. Montgomery walked out of the plant and joined the pickets because a plant guard would not grant

permission to Montgomery to cross the picket line to ask his sister for the keys for a car.

B. Other Company Activities.

1. At the time of the commencement of the picketing on July 14, 1970, the plant allowed employees three break periods during each work day in addition to the free time before and after work and during the lunch hour. Additionally, employees were permitted to go to the restrooms as often as necessary but the plant maintained a rule providing that no section should have more than two employees from one section in the restroom at one time during working hours. Employees increased the frequency of their restroom visits with the commencement of the picketing and plant manager, Virgil Boen, instructed supervisors to enforce the plant rule and prohibit employees from congregating and loitering in restrooms where it was suspected they were discussing union activity and membership.

2. During the month of August 1970, Jeanie Brooks, supervisor of the "zipper" section of the sewing room, told several employees under her control that if they left their jobs and joined the strike that: "you'll never get a job here". Brooks, however, did not solicit employee Mary Peeples to submit a written account of statements made to her by pickets as Peeples came into the plant, as Peeples volunteered this information.

3. Other employees asserted that supervisors Bixler and Cross made statements in the summer of 1970,

to the effect that if they joined the Union picket line, they would no longer work for Frisco. Though there may have been a slowing of production by reason of the picketing, each supervisor denied making such statement or threats and the employees involved seemed little influenced by their supervisors with regard to their decisions either to join or to refrain from joining the picketing at the Frisco plant.

4. During the month of August 1970, employee Madie Wormach, had occasion to be in plant manager Boen's office discussing the defective operation of her sewing machine. During the course of the conversation, Boen asked Wormach if she knew anything about union cards being passed around the plant. After denying any knowledge of cards being distributed, Boen asked her if she knew if another employee had any cards. Wormach denied any knowledge thereof.

During her conversation with Boen in his office in August 1970, Boen also asked Wormach if she would let him know when and where Union meetings were taking place. Several weeks later, Boen asked Wormach again if she had any information, but she denied having attended any such meetings. Wormach was equivocal about supporting the Union at the times she was in contact with Boen, and at one point in her testimony stated she "wasn't interested in it."

C. Conclusions

1. This Court has jurisdiction over the subject matter and the parties in this action as to Frisco.

2. There is insufficient clear and convincing evidence to establish that the picketing at the Frisco plant was to protest an unfair labor practice. The first employee who left the plant on or about July 31, 1970, to join the "outside" individuals picketing the plant who had been there since July 14, 1970, did so for economic reasons primarily rather than the subordinate claim or protest of an unfair labor practice. Montgomery's purpose in joining the pickets was to protest the refusal of a plant guard to allow him to cross the picket line and get a key to his car in accordance with a company policy, an insufficient basis to show an unfair labor practice. Montgomery and Sandra Ann Matchett walked out without making any effort to advise management of the nature of their grievances concerning any alleged unfair labor practice. Since all "concerted activity" is not protected by Section 7 of the National Labor Relations Act, the picketing activities of the Frisco employees were not so protected in this instance. Thus, when Montgomery and Matchett joined the pickets in front of the company's plant in Frisco City in July and August 1970, they assumed the status of economic strikers who are subject to replacement. *NLRB* v. *MacKay Radio & Telegraph Co.*, 384 U.S. 333 (1938); *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB* v. *International Van Lines*, 448 F.2d 905 (9th Cir. 1971). They were directed to return to work within a reasonable time and did not, so they thereby rendered themselves subject to replacement. Upon their later reapplication, Frisco did not violate either the National Labor Relations Board

or the Court's decree when they were not immediately reinstated when they applied for work. Furthermore, Matchett abandoned the strike on October 5, 1970, but waited until November 28, 1970, to seek re-employment, having failed to obtain a job elsewhere in the interim, thus legally voluntarily terminated her employment or right to re-employment at Frisco. The company committed neither an unfair labor practice nor violated the Court's decree when it failed to reinstate Sandra Ann Matchett and Randy Montgomery on November 28, 1970 and July 5, 1971, respectively.

3. The policy of the company in prohibiting loitering and clustering of employees in the restrooms after the commencement of the picketing during the 1970 summer was not calculated unduly to interfere with the employees in the exercise of their rights conferred by Section 7 of the Act. The frequency of visits to the restrooms by many of the female employees increased after the picketing began and since they were compensated on a production basis, the company's production suffered if congregation and assemblies of employees were permitted to take place in the plant restrooms, even if discussions were about Union activities. Enforcement of the policy did not unreasonably discriminate against the employees who were Union adherents. The employees were not precluded from discussing union matters before or after work or during the lunch period on company premises, or even during appropriate break times. The company supervisors did check the restrooms when more than two female employees left a section at a time during

the working day, and remained an unreasonable length of time away from their jobs. The supervisors may have engaged in conduct which created an impression of surveillance by following employees under these circumstances to restrooms, but did not hover over, shadow, or follow employees "engaged in the performance of routine tasks." "The Act, of course, does not prevent an employer from making and enforcing reasonable rules concerning the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours." *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U.S. 793, 803 (1945); *Peyton Packing Company*, 49 NLRB 828 (1943); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962). Enforcement of this policy was grounded upon legitimate business justifications and would be expected to result in an increase in the productivity of the employees. Accordingly, it did not constitute an unfair labor practice and did not violate the Court's decree.

4. At least one Frisco supervisor and plant manager, Boen, did interrogate employees about Union activity and initiated possible plant closure or job loss if workers joined the strike at the Frisco plant. This activity, though perhaps in over-all context minimal, did have the tendency (though not necessarily the effect) of restraining, influencing, or soliciting employees away from participation in Union affairs or activities in and about the plant.

IX. Recommendations

A. The special master recommends that Marlene Industries Corporation and Frisco Sportswear Co., Inc., be required to continue to comply fully with and obey this Court's judgment and decree of January 29, 1969.

B. Frisco supervisors should be required to be instructed and cautioned in writing that they may not question or interrogate or interfere with any present or prospective employee with respect to his or her union interest, membership or activity.

C. Frisco should be required to post a notice on all its bulletin boards for a period of sixty (60) days with a copy to the local President and Secretary of the local I.L.G.W. Union, signed by its plant manager, stating the basic provisions and effects of the Court's order of purgation, if it is held to be in civil contempt, and setting forth that it will affirmatively henceforth not interrogate, lay off, discharge or refuse to rehire employees because of lawful concerted or Union activities, or otherwise in any other manner, interfere with, restrain or coerce employees in the exercise of their protected activities. Further, such posted notice shall be placed conspiciously and maintained in a clearly legible condition for said consecutive sixty (60) day period.

D. Upon request by the I.L.G.W. Union, Frisco should immediately grant said Union and its representatives reasonable access, for a six month period, to plant bulletin boards.

E. Frisco employees should be permitted to have reasonable access to said Union organizers during non-working time only at plant approaches and Frisco parking lots for a period of six months from the issuance date of contempt judgment, if any, subject, however, to reasonable company regulations in the interests of plant efficiency and discipline.

F. Frisco should be required at its expense to publish in form to be approved by the National Labor Relations Board in newspapers of general circulation in the Frisco City, Alabama area, the essential terms and provisions of the Court's order, once a week for four consecutive weeks, at a reasonable time designated by the Board.

G. Frisco should be required to file a sworn statement with the Court within 20 days after any adjudication of contempt, and again after the posting and/or publishing period specified above showing what specific steps have been taken to comply with the Court's directions and orders.

H. Frisco should be required to pay all costs and out-of-pocket expenditures incurred by the National Labor Relations Board in connection with investigation and hearing of these proceedings relating to Frisco.

I. That the Court take such other and further action and grant such other and further relief as may be deemed just, reasonable and proper in respect of the findings, conclusions and recommendations herewith submitted as to Frisco.

Respectfully submitted,

/s/ Harry W. Wellford
Special Master

Date:

APPENDIX D

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 18064, 18249, 18250, 18256, and 18154

DECATURVILLE SPORTSWEAR CO., INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, INTERVENOR

NATIONAL LABOR RELATIONS BOARD, PETITIONER

and

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, INTERVENOR

v.

MARLENE INDUSTRIES CORPORATION, ET AL., RESPONDENTS

Jan. 29, 1969

Rehearing Denied March 5, 1969

Proceeding on petitions for review and cross petition for enforcement of order of National Labor Relations Board. The Court of Appeals, Combs, Cir-

cuit Judge, held that National Labor Relations Board order need not be tailored to fit separately each of plants of employer where employer has directed systemwide and centrally coordinated movement to commit unfair labor practices. The Court further held that Board order requiring employer to furnish union with list of names and addresses of all employees was too broad in that such information would normally have been unavailable at outset of organizing campaign so that provision granted to union substantially greater right than it would have had originally.

Enforcement granted in part and denied in part.

1. Labor Relations § 556

Evidence in unfair labor practice proceeding established that corporate employer and its manufacturing subsidiaries were guilty of deliberate and flagrant violations of National Labor Relations Act. National Labor Relations Act, § 8(a) (1, 3) as amended 29 U.S.C.A. § 158(a) (1, 3).

2. Administrative Law and Procedure § 741

In review of administrative order, courts will ordinarily consider relation of remedy to policy as peculiarly within field of administrative competence.

3. Labor Relations § 684

Remedy provided in order of National Labor Relations Board will not be disapproved unless its apparent purpose is to achieve ends other than those which fairly effectuate policies of National Labor Relations Act.

4. Labor Relations § 619

National Labor Relations Board's order may not go beyond that which is necessary to redress injury done to employees and it may not be used as instrument of punishment for employer.

5. Labor Relations § 619

Order of National Labor Relations Board should as nearly as possible restore parties to status quo which existed before unfair labor practices occurred and should eliminate imbalance created by violations of National Labor Relations Act. National Labor Relations Act, § 8(a), (1, 3) as amended 29 U.S.C.A. § 158(a) (1, 3).

6. Labor Relations § 619

National Labor Relations Board order need not be tailored to fit separately each of plants of employer where employer has directed systemwide and centrally coordinated movement to commit unfair labor practices. National Labor Relations Act, § 8(a) (1, 3) as amended 29 U.S.C.A. § 158(a) (1, 3).

7. Labor Relations § 619, 624

Requiring employer to mail copy of notice to all employees and to grant union access for period of one year to company bulletin boards and other places where notices to employees were usually posted was not abuse of discretion on part of National Labor Relations Board in view of its findings that employer and its manufacturing subsidiaries had conducted

centrally directed and violent campaign of massive and deliberate unfair labor practices at all of its manufacturing plants. National Labor Relations Act, § 8(a) (1, 3) as amended 29 U.S.C.A. § 158(a) (1, 3).

8. Labor Relations § 619

Requiring employer to permit union organizers to have access for period of six months during non-working time to plant approaches and parking lots under reasonable restrictions was directly related to employer's unlawful activity much of which was directed toward thwarting union's efforts to distribute literature to employees as they left work. National Labor Relations Act, § 8(a) (1, 3) as amended 29 U.S.C.A. § 158(a) (1, 3).

9. Labor Relations § 619

National Labor Relations Board order requiring employer to furnish union with list of names and addresses of all employees was too broad in that such information would normally have been unavailable at outset of organizing campaign so that provision granted to union substantially greater right than it would have had originally.

10. Labor Relations § 177, 192

Employer's obligation to allow his employees to discuss self-organization among themselves is greater than his obligation to furnish information to non-employee organizers, and in latter instance, consid-

eration must be given not only to question of employer's property rights and right to privacy but also to employees' right to privacy and freedom from harassment at home.

Charles Hampton White, Nashville, Tenn., for petitioners; Gullett, Steele, Sanford & White, Nashville, Tenn., on brief.

Charles N. Steele, Atty., N.L.R.B., Washington, D. C., for NLRB; Arnold Ordman, Gen. Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, Lawrence M. Joseph, Atty., N.L.R.B., Washington, D. C., on brief.

Morris P. Glushien, New York City, for intervenor.

Before O'SULLIVAN, CELEBREZZE, and COMBS, Circuit Judges.

COMBS, Circuit Judge.

These cases are before us on petition to review an order of the National Labor Relations Board, 166 N.L.R.B. No. 58. The Board cross-petitions for enforcement. The Board found that Marlene Industries Corporation and its manufacturing subsidiaries had conducted a centrally directed and violent campaign of massive and deliberate unfair labor practices at all seven of its manufacturing plants; that it had restrained and coerced employees in violation of Section 8(a) (1) of the Act, and discriminatorily discharged or refused to rehire seventeen named employees in violation of Section 8(a) (3) of the Act.

The Board's order includes the usual provisions

requiring that the company cease and desist from its unfair labor practices, post notices and reinstate employees wrongfully discharged. The order contains additional provisions which, to borrow a phrase from N.L.R.B. v. H. W. Elson Bottling Company, 379 F.2d 223 (6th Cir. 1967), are stronger medicine. Those provisions require that the company

1) mail the required notice to all employees and grant the union, upon request, reasonable access for one year to plant bulletin boards and places where employee notices are customarily posted;

2) permit union organizers for a period of six months to have access during non-working time to plant approaches and parking lots, subject to reasonable and non-discriminatory regulations in the interest of plant efficiency and discipline; and

3) provide the union, upon request made within one year, with a list of the names and addresses of all employees.

It is conceded by the Board that the above enumerated provisions of the order are unusual, but it is said that this is an unusual case.

Marlene Industries and its seven wholly owned subsidiary manufacturing plants employ approximately 3,000 workers in Tennessee, Alabama, and South Carolina. In May, 1965, the International Ladies' Garment Workers' Union commenced an organizational campaign among employees of the sub-

sidiary plants. The company countered with a concerted and well-directed campaign of anti-union activities which led to these proceedings. The activities included, inter alia, coercive speeches by Marlene executives, and promises that if the union was rejected benefits such as Christmas bonuses, fully paid life insurance policies, and additional paid holidays would be forthcoming. Speeches were also made by company officials and by prominent local citizens warning that particular plants would be closed if organized.

Union organizers were prohibited from distributing literature on company property. Union attempts to distribute literature on public property adjacent to company grounds were frustrated when management oriented employees utilized such tactics as spraying ink on organizers, throwing tomatoes at them, knocking leaflets from their hands, removing leaflets from car windshields and damaging the organizers' cars. The organizers' task of distributing union literature was also hampered when the flow of traffic from company parking lots was expedited by halting cars on adjacent public roads, thus speeding the employees' exit from the plants. Employees were questioned about union activities and urged not to accept union literature. Organizers were kept under surveillance by the company and employees who accepted leaflets were photographed and a record made of their names. Organizers' cars were forced off the highway, and the organizers were threatened with physical injury.

The foregoing are typical, but not exclusive, of the massive anti-union activities carried on by the company. Although each specific act listed did not occur at every plant, some of them did occur at each of the plants and many of them occurred at all plants.

[1] The company contends that the Board's findings are not supported by substantial evidence, and argues that the Board systematically discredited all evidence offered by the company, drew adverse inferences from the failure of some company officials to testify, and placed the company under an erroneous burden of proof. We disagree. The evidence is overwhelming that the company was guilty of deliberate and flagrant violations of the Act.

In view of the Board findings, and ours, that this is an aggravated case of deliberate and flagrant violation of the Act by the company, we concern ourselves only with the appropriateness of the Board's order. Although the company attacks the Board's order in its entirety, it directs its heaviest fire toward those provisions which allow union organizers to have access for six months to company parking lots; requires the company, upon request, to furnish the union with a list of the names and addresses of all company employees; and makes the order applicable to all plants without regard to specific violations found to have occurred at the respective plants.

[2-5] In the review of an administrative order, the courts will ordinarily consider the relation of remedy to policy as peculiarly within the field of administrative competence. The remedy provided in an

order will not be disapproved unless its apparent purpose is to achieve ends other than those which fairly effectuate the policies of the Act. Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964). The Board's order may not go beyond that which is necessary to redress the injury done to the company's employees. It may not be used as an instrument of punishment for the employer. Local 57, International Ladies' Garment Workers' Union v. N.L.R.B., 126 U.S.App.D.C. 81, 374 F.2d 295 (1967), cert. denied, 387 U.S. 942, 87 S.Ct. 2078, 18 L.Ed.2d 1328 (1967). The order should as nearly as possible restore the parties to the status quo which existed before the unfair practices occurred. It should eliminate the imbalance created by the violations of the Act. See Local 60, United Brotherhood of Carpenters and Joiners of America v. National Labor Relations Board, 365 U.S. 651, 81 S.Ct. 875, 6 L.Ed.2d 1 (1961).

[6] The company's argument that the order should be tailored to fit separately each of the seven plants cannot be sustained. The rule is that an order need not be so limited where, as here, the company has directed a system-wide and centrally coordinated movement to commit unfair labor practices. National Labor Relations Board v. Salant & Salant, Inc., 183 F.2d 462 (6th Cir. 1950); also see Montgomery Ward & Co. v. N.L.R.B., 339 F.2d 889 (6th Cir. 1965).

[7] It is clear, too, that under the circumstances here shown the Board did not abuse its discretion in

ordering the company to mail a copy of the notice to all employees and to grant the union access for a period of one year to company bulletin boards and other places where notices to employees are usually posted. N.L.R.B. v. H. W. Elson Bottling Company, 379 F.2d 223 (6th Cir. 1967); Textile Workers Union of America v. N.L.R.B., 388 F.2d 896 (2nd Cir. 1967), cert. denied, J. P. Stevens & Co., Inc. v. N.L.R.B., 393 U.S. 836, 89 S.Ct. 112, 21 L.Ed.2d 107 (1968).

[8] Since many of the company's unfair practices were directed toward thwarting the union's efforts to distribute literature to employees as they left work, granting access to parking lots under reasonable restrictions is directly related to the company's unlawful activity. This provision merely removes the disadvantages caused to the union by reason of the company's violations. Cf. Consolidated Edison Company v. National Labor Relations Board, 305 U.S. 197, 236, 59 S.Ct. 206, 83 L.Ed. 126 (1938). Thus is restored the status quo which existed at the outset of the organizing campaign. National Labor Relations Board v. Babcock & Wilcox Co., 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956), on which the company relies, is not inconsistent with our decision on this point. There, the question was whether denial of access to company property in order to distribute union literature constituted an unfair labor practice and the Supreme Court held it did not. Here, the question is whether reasonable access to company property for a limited time is an appropri-

ate remedial measure after a finding of unfair labor practices. The two questions involve different considerations. We conclude therefore that this is a valid exercise of the Board's authority. We note that this provision is limited to a six months' period and is subject to reasonable regulations in the interest of plant efficiency and discipline. Should the union abuse the privilege and interfere with plant discipline or efficiency, the company has recourse to the Board and ultimately to the courts.

[9, 10] We look now to that part of the order which requires the company to furnish to the union a list of the names and addresses of all company employees. We think this provision goes too far. Other provisions of the order which we are now approving will provide opportunity for reasonable access to employees and should eliminate from their minds any fear of reprisal for engaging in lawful union activity. This information would normally have been unavailable at the outset of the organizing campaign. Thus, this provision grants to the union a substantially greater right than it would have had originally. This strikes us as doing more than redressing an imbalance. The employer's obligation to allow his employees to discuss self-organization among themselves is greater than his obligation to furnish information to non-employee organizers. Textile Workers Union of America v. N.L.R.B., 388 F.2d 896 (2nd Cir. 1967), cert. denied, J. P. Stevens & Co., Inc. v. N.L.R.B., 393 U.S. 836, 89 S.Ct. 112, 21 L.Ed.2d 107 (1968); N.L.R.B. v. Challenge-Cook Brothers of

Ohio, Inc., 374 F.2d 147 (6th Cir. 1967); see National Labor Relations Board v. Babcock & Wilcox Co., 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956). In the latter instance consideration must be given not only to the question of the employer's property rights and right to privacy but also to the employees' right to privacy and freedom from harrassment at home. In the *Textile Workers* case, supra, the Second Circuit denied enforcement of a similar provision under somewhat similar circumstances. We therefore deny enforcement of that part of the Board's order in the instant case.

The Board's petition for enforcement is granted except for the provision which directs the company to furnish to the union a list of the names and addresses of its employees.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18,064

[Filed Jan. 29, 1969, Carl W. Reuss, Clerk]

DECATURVILLE SPORTSWEAR CO., INC., TROUSDALE MANUFACTURING CO., INC., WESTMORELAND MANUFACTURING CORPORATION, RAY RINDONE, DANIEL BEITSCH AND L. E. BROYLES, PETITIONERS

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

LADIES' GARMENT WORKERS' UNION, AFL-CIO, INTERVENOR

ORDER

Before: O'SULLIVAN, CELEBREZZE and COMBS, Circuit Judges.

On petition to review and cross-petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition for enforcement is granted except for the provision which

directs the company to furnish to the union a list of names and addresses of its employees.

No costs awarded. Rule 39(b).

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

Issued as Mandate: March 13, 1969

COSTS: AWARDED TO NATIONAL LABOR RELATIONS BOARD in Cases 18,064, 18,249, 18,250, 18-256 and 18,154

Printing brief—$284.85

A True Copy.
ATTEST:

/s/ Carl W. Reuss
Clerk

APPENDIX F

Marlene Industries Corporation; Decaturville Sportswear Co., Inc.; Trousdale Manufacturing Co., Inc.; Westmoreland Manufacturing Corporation; Frisco Sportswear Co., Inc.; Aynor Manufacturing Company, Inc.; Loris Manufacturing Company, Inc.; Charles Meltzer, Individually and as President of Marlene Industries Corporation; Samuel Meltzer, Individually and as Treasurer of Marlene Industries Corporation; Abraham Dansky, Individually and as Vice President of Marlene Industries Corporation; Ray Rindone; Daniel Beitsch; L. E. Broyles; C. M. Jones; Victor Martin; Lolyd Eppersimons; W. J. Schwartz and Aynor Development Corporation *and* International Ladies' Garment Workers' Union, AFL-CIO. Cases 26-CA-2158, 2216, 2216-2, and 2276

July 3, 1967

DECISION AND ORDER

On September 23, 1966, Trial Examiner Paul E. Weil issued his Decision in the above-entitled proceedings, finding that the Respondent [1] had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations

[1] As did the Trial Examiner, we will herein refer to the corporations and individuals named above collectively as the "Respondent." At certain places in his Decision, the Trial Examiner incorrectly referred both to the corporate Respondent Decaturville and the town in which it is located as "Decatursville." We hereby correct this inadvertent error.

Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in other unfair labor practices alleged in the complaint and recommended dismissal of those allegations. Thereafter, the Respondent and the Charging Party filed exceptions to the Decision and supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.[2] The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in these cases, and hereby adopts the findings,[3] con-

[2] We find totally without merit Respondent's allegations of bias and prejudice on the part of the Trial Examiner. We have fully considered the entire record and the Trial Examiner's Decision and we perceive no evidence that the Trial Examiner prejudged this case, made prejudicial rulings, or demonstrated a bias against Respondent in his analysis or discussion of the evidence. Specifically, we conclude that the Trial Examiner's credibility findings are not contrary to the clear preponderance of all the relevant evidence and therefore find no basis for disturbing them. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). Moreover, the errors in his analysis of testimony, noted *infra* in fn. 4, are clearly insufficient to establish bias. *Gopher Aviation, Inc.*, 160 NLRB 698.

[3] Among the numerous 8(a)(1) violations which the Trial Examiner found had occurred at the Aynor plant was Supervisor Floriano's interrogation of Linda Collins. However, the Trial Examiner inadvertently omitted discussion of Collins'

clusions,[4] and recommendations of the Trial Examiner, with the following modifications:

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uncontroverted testimony, which he obviously credited and upon which his finding was based. Collins testified that Floriano first asked her if she was going to the union meeting at Christine Sellers' house, and, following the day of the meeting, inquired if she had in fact attended.

The Trial Examiner found an 8(a)(1) violation in Respondent's posting, at the Aynor, Frisco City, and Loris plants, copies of an antiunion advertisement entitled "WHO DO YOU BELIEVE?" which appeared in the local Aynor paper and was sponsored by the Aynor Development Corporation. Since the record reveals that this advertisement was posted only at the Frisco City plant and not, as the Trial Examiner found, at all three plants, we affirm the 8(a)(1) finding only as to the Frisco City plant.

[4] We hereby correct certain statements in the Trial Examiner's Decision to conform with the record, noting that these corrections in no way affect our agreement with the Trial Examiner's ultimate findings herein: (1) With respect to the discharge of Mary Roberts, Jordan admitted only that other employees had been given an option of declining work offered them in lieu of a layoff. While she did not testify, as the Trial Examiner states, that these employees had been recalled to work, such a conclusion is implicit in her testimony. (2) With respect to the discharge of Geneva Allen, the production records show that Allen had $.63 makeup her next to last workweek, not her last week, as the Trial Examiner states. Her final week's makeup was $4.21. (3) With respect to the discharge of Letha Tyler, the General Counsel asked Adkins to identify the June 16 termination slip of Letha Tyler before, not after, the July 13 slip. (4) With respect to the discharge of Pauline Strickland, the Trial Examiner incorrectly referred to the cross-examination of Strickland instead of Jordan, and, in the same sentence, referred to Edna Gerrald when he should have referred to Mary Roberts. Later, the Trial Examiner referred to Mary Roberts as an employee who was recalled to work after having quit, when he should have referred to Edna Gerrald. With

John Disher, a known union adherent, was purportedly discharged from the Loris No. 2 plant for soliciting for the Union on working time without Respondent's prior approval, in violation of a posted rule prohibiting solicitation for membership in any organization "on company time and on company property," although allowing solicitation for other causes during similar periods if previously authorized by

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respect to fn. 26 of the Trial Examiner's Decision, Jordan testified that she told Squires the names of employees attending the union meeting, and not, as the Trial Examiner states, that Squires told her. (5) With respect to the discharge of Christine Sellers, the record shows that when Sellers refused to move, Hucks went to get Adkins and it was Adkins, not Hucks, whom Sellers asked for a layoff; also that Hucks was not asked if Shelby Dix sewed on Sellers' machine, but only if Sellers had sewed on Dix's machine. (6) There is no evidence that Supervisor Grainger admitted to employee King that Plant Manager Schwartz instigated the inking incident outside the Loris No. 1 plant. But King did testify that Grainger warned her that if she didn't join the inking party, the Company would fire her or the plant would close. (7) With respect to fn. 46 of the Trial Examiner's Decision, Medlin testified that she reported to Eppersimons Disher's solicitation of her and not, as the Trial Examiner states, that she reported Disher's solicitation of Mincey. (8) Concerning the events preceding his discharge, Eugene Skipper testified that he complained to Foreman Roscoe about the excessive repairs he was receiving from the bundle boy. He did not testify, as the Trial Examiner says, that he complained to the bundle boy, who replied that Roscoe had ordered him to do it. (9) With respect to Respondent Marlene's participation, Dansky spoke to employees of all plants except Frisco. (10) With respect to the Trial Examiner's discussion in the section entitled "The Remedy," there were unruly mobs of employees involved in assaults upon union organizers instigated or approved by management and supervisory employees at Loris, Decaturville, and Hartsville, but not at Aynor.

management. The Trial Examiner found that Respondent's discharge of Disher was discriminatory and violated Section 8(a)(3). We adopt his finding because, as he found, there is ample evidence in the record that Respondent's supervisors trapped Disher into soliciting for the Union during working hours in order to establish a pretext for firing him.

We do not adopt the Trial Examiner's reliance upon the Supreme Court's decision in *N.L.R.B.* v. *United Steel Workers of America (Nutone, Inc.)*, 357 U.S. 357, in finding the rule discriminatorily applied and the discharge therefore unlawful, since the Court there held that an employer who engages in antiunion solicitation in a manner forbidden to his employees by a valid no-solicitation rule does not without more commit an unfair labor practice in enforcing the rule against prounion solicitation by employees. However, we do find that the rule, which may be read to prohibit union solicitation on company property even during an individual employee's nonworking time, was "at best ambiguous and the risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by it."[5] This ambiguity, coupled with the discriminatory treatment accorded union solicitation both on the face of the rule and in its application,[6] would undoubtedly inhibit employees

[5] *N.L.R.B.* v. *Miller d/b/a Miller-Charles & Co.*, 341 F.2d 870, 874 (C.A. 2), enfg. 148 NLRB 1579.

[6] This conclusion is based on the plant manager's testimony, noted by the Trial Examiner, that he had in effect excused

from exercising their right to solicit for the Union on nonworking time anywhere on company property. For these reasons, we find the no-solicitation rule, as promulgated, maintained, and applied in Loris No. 2,[7] violated Section 8(a)(1) of the Act. Consequently, even if Disher were actually discharged for violating this rule—which we have found was not the reason for his discharge—the discharge would still violate Section 8(a)(3) and (1).[8]

violations of the rule by employees who engaged in other types of solicitation on working time without permission, but discharged Disher for union solicitation under the same circumstances.

[7] We also affirm the Trial Examiner's finding that the no-solicitation, no-distribution rule admittedly "maintained" by Respondent at all plants was invalid on its face and violated Section 8(a)(1) for the reasons which he sets forth. However, we do not adopt his finding (TXD, fn. 43) that it was "posted" at Respondent's plants; contrary to the Trial Examiner's finding, the complaint did not allege and Respondent did not admit that such was the case, and the record does not establish it.

Member Zagoria agrees that the no-solicitation aspect of the separate rule at the Loris No. 2 plant is sufficiently ambiguous in its phrasing so that employees are deprived of their right to engage in union solicitation on nonwork time. He finds this a violation of Section 8(a)(1) of the Act. However, he would not find granting of permission by the Respondent to solicit for other causes as removing its right to prohibit union solicitation on worktime. As the no-solicitation aspect of the rule maintained by Respondent at all its plants proscribes only such employee solicitation as interferes with production, he would also hold that the granting of permission to solicit for other causes does not invalidate this otherwise lawful no-solicitation rule.

[8] In *Miller-Charles, supra*, the Board found that employee Vega was discriminatorily discharged for distributing union

THE REMEDY

The Trial Examiner concluded that the conventional reinstatement, backpay, and posting of notice remedies for Respondent's violations of Section 8(a)(3) and (1) of the Act were inadequate to ameliorate the chilling effect of Respondent's massive and deliberate unfair labor practices. The Trial Examiner correctly found that Respondent's unfair labor practices were directed in substantial part towards the prevention of any direct communication and contact between its employees and the Union, while at the same time Respondent and its agents carried on an extensive unlawful antiunion campaign. Hence, he ordered Respondent, in addition to the usual remedies, to (1) mail a copy of the notice to all employees; (2) grant the Union and its representatives, upon request, reasonable access for a 1-year period to its bulletin boards and other places where notices to employees are customarily posted; (3) make available to the Union, upon request, at a mutually agreeable time within 3 months, suitable facilities for a 1-hour

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leaflets in violation of an invalid no-distribution rule. In granting enforcement of a reinstatement and backpay order, the Court of Appeals for the Second Circuit said, "The Respondent apparently did not adequately distinguish between protected and nonprotected distributions, and in the absence of a rule making a valid distinction that would be clear to employees, Vega's discharge had the effect of interfering with protected, organizational rights." 341 F.2d at 874. Although Vega, unlike Disher, was engaged in union activities on nonwork time, we find the principle expressed by the court applicable herein under the circumstances detailed above. See also *Story Oldsmobile, Inc.*, 140 NLRB 1049, 1058.

meeting with employees on company time; (4) publish the "Notice to All Employees" at its expense once a week for 3 consecutive weeks in a newspaper of general circulation in each community where it had a plant; (5) permit employees to have access to union organizers during nonworking time on plant approaches and parking lots;[9] and (6) address and mail prestamped union literature to all employees on three occasions, and thereafter whenever the Respondent or its agents should employ the mails to disseminate antiunion literature.

We agree with the Trial Examiner that extraordinary as well as conventional remedial provisions are both essential and appropriate in this case. In our opinion, however, certain modifications of the Trial Examiner's recommended remedies are desirable.

The Trial Examiner was requested by the Charging Party to order Respondent to furnish it with a list of names and addresses of Respondent's employees. The Trial Examiner refused to do so in order to safeguard what he considered the right of privacy of those employees to whom a home visit by the Union would be unwelcome. However, noting that under the circumstances of the present case "any attempt to talk with employees or distribute literature at or near plant property might well be meaningless,"

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[9] We do not adopt the Trial Examiner's recommendation that Respondent be ordered to "cease and desist" from interfering with the access of employees to union organizers on company property since we make no finding that Respondent violated the Act by denying such access in the past.

he recommended that Respondent be required to address and mail prestamped union literature to all employees on three occasions and thereafter whenever Respondent or its agents sent antiunion literature through the mails. We find merit in the Charging Party's exception to the Trial Examiner's refusal to grant the remedy it requested. We believe that one of the best ways to insure the right of Respondent's employees, which Respondent so flagrantly violated, to be informed of their Section 7 right to organize is to give the Union herein the opportunity which we recently afforded the Union in *J. P. Stevens and Co., Inc.*, 163 NLRB 217, to "make known its views in an atmosphere relatively free of restraint and coercion." Any resultant intrusion into the right of privacy of employees will be minimal since such employees are free to refuse home visits or telephone calls by union organizers. Moreover, we cannot now assume that those who chose this course will therefore encounter harassment or coercion by the Union. Accordingly, "[a]s the Respondent was responsible for the unfair labor practices in the plants and for the attendant lack of organizational opportunities, and as all the employees' names and addresses are not available from sources other than the Respondent," [10] we shall require Respondent, upon request of the Union made within 1 year of the issuance date of this Decision, to give to the Union a list of names and

[10] *J. P. Stevens and Co., Inc., supra,* under the section entitled "The Remedy" and cases therein cited at fn. 23.

addresses of all employees at its Tennessee, Alabama, and South Carolina plants.

Another remedy which we, like the Trial Examiner, find essential in order to effectuate fully the policies of the Act is to permit employees to have access to union organizers on plant parking lots and plant approaches during nonworking time. We limit such access on company property, however, to the 6-month period following the issuance of this Decision. Although, as the Trial Examiner fears, Respondent's history of violent hostility to unionization may well make union organizing at or near the plants meaningless for some time to come, we think that the possibility that some employees will avail themselves of the opportunity for communication with organizers provided for by this remedy amply justifies its inclusion. *Babcock & Wilcox* [11] is not, in our opinion, authority to the contrary. There, the issue of access by union organizers to company property arose in the context of an unfair labor practice allegation against the employer for refusing such access. The Supreme Court, in dismissing that allegation, held that an employer has a right to bar nonemployee organizers from coming on its property provided that the Union has other means of communicating with employees and the employer "does not discriminate against the union by allowing other distribution." The Court specifically noted, however, that "when the inaccessibility of employees makes ineffective the

[11] *N.L.R.B.* v. *Babcock & Wilcox Company,* 351 U.S. 105.

reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication or information on the right to organize." [12] In the instant case, we are concerned with the issue of access by nonemployee organizers in a remedial context. Furthermore, unlike the respondent in *Babcock & Wilcox*, this Respondent committed massive unfair labor practices which were, in substantial part, of a kind deliberately calculated to thwart the Union's attempts to communicate with employees through the usual channels. For these reasons, we believe that the limited intrusion into Respondent's "right to exclude from property" which we are by our Order allowing is not inconsistent with the Court's decision.

We come now to the related remedial provisions, listed above as (1), (2), (3), and (4), which the Trial Examiner recommended. Although these remedies may be individually justifiable, we find that (3) and (4) are cumulative in remedial purpose in light of the two remedies, listed above as (5) and (6), which we have previously found appropriate. We have therefore decided to adopt only (1) and (2), requiring Respondent to mail a copy of the notice to each employee, and to grant the Union, upon request, reasonable access to employee bulletin boards and other places where notices to employees are custo-

[12] We do not adopt the Trial Examiner's reference to the Court's decision in *Babcock & Wilcox*, in the section entitled "The Remedy," since we find it misleading.

marily posted for a 1-year period from the issuance date of this Decision.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Marlene Industries Corporation, New York, New York; Decaturville Sportswear Co., Inc., Decaturville, Tennessee; Trousdale Manufacturing Co., Inc., Hartsville, Tennessee; Westmoreland Manufacturing Corporation, Westmoreland, Tennessee; Frisco Sportswear Co., Inc., Frisco City, Alabama; Aynor Manufacturing Company, Inc., Aynor, South Carolina; and Loris Manufacturing Company, Inc., Loris, South Carolina; their officers, agents, successors, and assigns, including but not limited to Charles Meltzer, Samuel Meltzer, Abraham Dansky, Ray Rindone, Daniel Beitsch, L. E. Broyles, C. M. Jones, Victor Martin, Lloyd Eppersimons, W. J. Schwartz, and Aynor Development Corporation, shall:

1. Cease and desist from:

(a) Discharging, laying off, forcing termination of, or otherwise discriminating against employees in order to discourage membership in or support of International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, or encouraging or permitting employees to engage in antiunion activity while prohibiting employees from engaging in activity on behalf of the Union.

(b) At any time instigating, encouraging, or causing employees or other persons to engage in assaults or threats of violence directed at persons engaged in activities on behalf of International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, or permitting employees or other persons on company property to engage in such conduct.

(c) Banging on, spraying ink on, or damaging automobiles and other property of persons lawfully engaged in activities on behalf of the above-named labor organization or any other labor organization.

(d) Promising or granting to employees benefits, such as paid holidays, insurance, or vacation or bonus pay, when the pu pose thereof is to interfere with the self-organizational efforts of employees or to induce employees to reject or refrain from activities in support of International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization.[13]

(e) Engaging in surveillance of employees' activities with respect to union organization.

(f) Engaging in surveillance by photographing employees engaged in union organizational activities.

(g) Creating an impression of surveillance of employees' union activities by telling employees that the Employer has lists of employees who engaged in union activities.

(h) Threatening employees with discharge or other reprisals if they become or remain members of the Union or give assistance or support to it.

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[13] The Trial Examiner inadvertently omitted this remedial provision from his Recommended Order and Notice to All Employees.

(i) Encouraging and assisting employees in withdrawing from the Union.

(j) Interrogating employees concerning their or other employees' union organizational activities or their opinions regarding union organization.

(k) Instructing employees to watch for union activities and listen for opinions regarding union organization of other employees and report findings to us.

(l) Promulgating, maintaining, or enforcing no-solicitation rules prohibiting employees during nonworking time from soliciting for the Union on Respondent's property.

(m) Promulgating, maintaining, or enforcing no-distribution rules prohibiting employees during nonworking time from distributing materials on behalf of the Union in nonworking areas of Respondent's property.

(n) Enforcing rules prohibiting solicitation during worktime in a manner which discriminates against solicitation on behalf of the Union.

(o) Threatening employees with closing or moving the plant should they engage in activities on behalf of the Union or select the Union as their collective-bargaining agent.

(p) Coercing employees by telling them that other employees had been discharged or would not be recalled because of their union activities.

(q) Warning employees that they would not be able to get a job in any plant in the State if they were known to favor the Union.

(r) Warning employees not to acecpt or read union literature, and to destroy any such literature that they received.

(s) Altering working conditions when the purpose thereof is to interfere with the self-organizational efforts of employees or with their right to join or assist International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization.

(t) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer to the employees whose names appear in the Appendix attached hereto reinstatement to their former positions or to substantially equivalent positions without prejudice to their seniority; and make each such employee whole for any loss of pay he may have suffered by reason of Respondent's discrimination against him, in the manner described in "The Remedy" section of the Trial Examiner's Decision.

(b) Notify those employees set forth above, if presently serving in the Armed Forces of the United

States of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination or copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due and the rights of employment under the terms of this Order.

(d) Mail a copy of the attached notice marked "Appendix" [14] to each employee, and post copies at their plants located in South Carolina, Alabama, and Tennessee. Copies of said notice, on forms provided by the Regional Director for Region 26, shall be signed by a managing representative of Respondent, Marlene Industries Corporation. Thereafter, a copy shall be mailed by the Companies to each of their employees working in their South Carolina, Alabama, and Tennessee plants, and additional signed copies shall be posted by them and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Companies to insure that said notices

[14] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

are not altered, defaced, or covered by any other material.

(e) Upon request of the Union, immediately grant the Union and its representatives reasonable access, for a 1-year period, to plant bulletin boards and all places where notices to employees are customarily posted.

(f) Instruct employees, supervisors, and members of management that physical assaults or threats thereof directed at union organizers or employees engaged in union activities will not be tolerated on plant premises at any time, and take reasonable, effective steps to enforce such rule and to protect employees and union organizers lawfully on its premises.

(g) Upon request of the Union, made within 1 year of the issuance date of this Decision, immediately give to the Union a list of the names and addresses of all employees in their plants in Tennessee, Alabama, and South Carolina.

(h) Permit employees to have unrestricted access to union organizers during nonworking time on plant approaches and parking lots for a period of 6 months from the issuance date of this Decision, subject only to such reasonable and nondiscriminatory regulations as Respondent may find it necessary to impose in the interest of plant efficiency and discipline, provided, however, that said regulations do not serve to thwart the employees in the exercise of the right guaranteed them herein.

(i) Notify the Regional Director for Region 26, in writing, within 10 days from the date of this

Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discharge, lay off, force termination of, or otherwise discriminate against employees in order to discourage membership in or support of International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, or encourage or permit employees to engage in antiunion activity while prohibiting employees from engaging in activity on behalf of the Union.

WE WILL NOT at any time instigate, encourage, or cause employees or other persons to engage in assaults or threats of violence directed at persons engaged in activities on behalf of International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, or permit employees or other persons on company property to engage in such conduct.

WE WILL NOT bang on, spray ink on, or damage automobiles and other property of persons lawfully engaged in activities on behalf of the above-named labor organization or any other labor organization.

WE WILL NOT promise or grant benefits such as paid holidays, insurance, or vacation or bonus pay where the purpose thereof is to interfere with employees' self-organizational efforts or to induce employees to reject or refrain from activities in support of International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization.

WE WILL NOT engage in surveillance of employees' activities with respect to union organization.

WE WILL NOT engage in surveillance by photographing employees engaged in union organizational activities.

WE WILL NOT create an impression of surveillance of employees' union activities by telling employees that the employer has lists of employees who engaged in union activities.

WE WILL NOT threaten our employees with discharge or other reprisals if they become or remain members of the Union or give assistance or support to it.

WE WILL NOT encourage or assist employees in withdrawing from the Union.

WE WILL NOT interrogate our employees concerning their or other employees' union organizational activities or their opinions regarding union organization.

WE WILL NOT instruct employees to watch for union activities and listen for opinions regarding union organization of other employees and report findings to us.

WE WILL NOT promulgate, maintain, or enforce no-solicitation rules prohibiting solicitation on behalf of the Union during nonworking time on our property.

WE WILL NOT promulgate, maintain, or enforce no-distribution rules prohibiting the distribution of materials on behalf of the Union during nonworking time in nonworking areas of our property.

WE WILL NOT by discharging or otherwise disciplining employees enforce rules prohibiting solicitation during worktime in a manner which discriminates against solicitation on behalf of the Union.

WE WILL NOT threaten employees with closing or moving the plant should they engage in activities on behalf of the Union or select the Union as their collective-bargaining agent.

WE WILL NOT coerce employees by telling them that other employees had been discharged or would not be recalled because of their union activities.

WE WILL NOT warn employees that they would not be able to get a job in any plant in the State if they were known to favor the Union.

WE WILL NOT warn employees not to accept or read union literature, or to destroy any such literature that they receive.

WE WILL NOT alter working conditions when the purpose thereof is to interfere with the self-organizational efforts of our employees or with their right to join or assist International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities.

WE WILL offer to the employees whose names appear below reinstatement to their former positions or to substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed; and make each such employee whole for any loss of pay he may have suffered by reason of our discrimination against him, with interest.

Stanford Roberts	Joe Doyle, Jr.
Mary Roberts	Edna Alford Gerrald
Geneva Allen	Barbara Smith
Margaret Dell Jordan	Pauline Strickland
Harry T. Rabon	Nannie Martin
Minnie Bourne Lane	Christine Sellers
Letha Tyler	Drunella Lewis
Ruth Gerrald	John B. Disher

Eugene D. Skipper

WE WILL, upon request of the Union, immediately grant the Union and its representatives reasonable access, for a 1-year period, to our bulletin boards and all places where notices to employees are customarily posted.

WE WILL permit employees to have unrestricted access to union organizers during nonworking time on plant approaches and parking lots for a period of 6 months, subject only to such reasonable and nondiscriminatory regulations as may be necessary in the interest of plant efficiency and discipline.

WE WILL instruct our employees, supervisors, and members of management that physical assaults or threats thereof directed at union organizers or employees engaged in union activities will not be tolerated on plant premises at any time, and take reasonable, effective steps to enforce such rule and to protect employees and union organizers lawfully on its premises.

MARLENE INDUSTRIES CORPORATION;
DECATURVILLE SPORTSWEAR CO., INC.;
TROUSDALE MANUFACTURING CO., INC.;
WESTMORELAND MANUFACTURING CORPORATION;
FRISCO SPORTSWEAR CO., INC.;
AYNOR MANUFACTURING COMPANY, INC.;
LORIS MANUFACTURING COMPANY, INC.
(Employer)

Dated By
(Representative) (Title)

NOTE: We will notify any of the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee 38103, Telephone 534-3161.

[Trial Examiner's Decision omitted.]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-269

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DECATURVILLE SPORTSWEAR COMPANY, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Opinions Below	1
Question Presented	2
Introduction	2
Statement of the Case	3
Argument	5
The Court of Appeals applied the correct standard in reviewing the findings, conclusions, and recommendations of the Special Master and correctly determined that the Company was not shown by clear and convincing evidence to have violated its decree; accordingly, the writ should be denied	5
Conclusion	10

CITATIONS

Cases

Decaturville Sportswear Company, Inc. v. NLRB, 406 F. 2d 886 (6th Cir. 1969)	2
Marlene Industries Corporation, 166 NLRB 703 (1967)	2
Marlene Industries Corporation, 171 NLRB 848 (1968)	2
NLRB v. Local 5881, United Mine Workers of America, 323 F.2d 853 (6th Cir. 1963)	5
NLRB v. Adam Loos Boiler Works Co., 435 F.2d 707 (6th Cir. 1970)	9

NLRB v. Lynair, Inc., 380 F.2d 286 (6th Cir. 1967) ... 5
NLRB v. Warren Co., 350 U.S. 107 (1955) 5, 6, 7, 8, 9
NLRB v. Whitfield Pickle Co., 374 F.2d 576 (5th Cir. 1967) 9
Sylco Corporation, 184 NLRB 741 (1970) 3
Union Tool Co. v. Wilson, 259 U.S. 107 (1922) 7

Statute

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.)
Section 8(a)(1) 2, 4
Section 8(a)(3) 2, 4
Section 8(a)(5) 2

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The Respondents, Decaturville Sportswear Co., Inc. et al. [subsequently referred to as "the Company"], oppose the Petition for a Writ of Certiorari in this cause because the United States Court of Appeals for the Sixth Circuit correctly determined the question presented and there is no compelling reason why its decision should be reviewed by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals is not officially reported. The findings and conclusions of the Special Master, which were adopted by the Court of Appeals, are set out in two memoranda and are reproduced in the appendix to the petition for certiorari.

QUESTION PRESENTED

Whether the Court of Appeals properly concluded that the Petitioner failed to establish a violation of its decree by clear and convincing evidence.

INTRODUCTION

This proceeding represents the third major confrontation between the International Ladies' Garment Workers' Union, AFL-CIO [subsequently called "the Union"], and Marlene Industries Corporation and its wholly owned subsidiaries [hereinafter referred to as "the Company"] to organize the Company employees. As outlined in the first proceeding, *Marlene Industries Corporation*, 166 NLRB 703 (1967), enforced in part in *Decaturville Sportswear Company, Inc. v. NLRB*, 406 F.2d 886 (6th Cir. 1969), the Union began its organizing campaign at the Company's plants in Tennessee, South Carolina, and Alabama in May, 1965, over ten years ago.

In the second encounter, the Union demanded recognition at both the Trousdale Manufacturing Co., Inc., and Westmoreland Manufacturing Corporation plants in Tennessee in March and April, 1966. Recognition was declined, and the National Labor Relations Board issued a complaint charging the Company with the unlawful discharge of three employees, interrogation and threats to another, and an unlawful refusal to recognize and bargain with the Union, all in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended [subsequently referred to as "the Act"]. This case, *Marlene Industries Corporation*, 171 NLRB 848 (1968) was tried before the same trial examiner who recommended that the complaint be dismissed in its entirety since he found that the Company had committed no unfair labor practices. His recommended order

was adopted by the National Labor Relations Board, without modification, in May, 1968.

The Union has asked for only one election at a Company plant, Slyco Corporation at Sylva, North Carolina. This occurred in 1968. In August, 1970, the National Labor Relations Board certified that the Union was defeated in that election contest. *Sylco Corporation*, 184 NLRB 741 (1970).

STATEMENT OF THE CASE

It is against this background of a continuing organizing campaign that the evidence considered by the Special Master and Court of Appeals must be considered. The Union has continued its organizing campaign from May, 1965, through July 15, 1970, at all of the Company's plants embraced by the decree of the Court of Appeals except at Decaturville where picketing began on June 23, 1970. Since most of the evidence considered by the Special Master and Court of Appeals concerned allegations regarding events at Decaturville, a brief recital of what the Special Master found to have occurred at this plant is in order.

On June 23, 1970, a presser, Nelson Rushing, was discharged by plant manager, Lloyd Anderson, because of Rushing's refusal to come to the plant manager's office to discuss a production problem. Some fifty-odd pressers in the pressing department refused to return to work unless the Company rescinded its discharge of Rushing. When the Company declined, the pressers walked out in protest of Rushing's discharge and began picketing the plant. The Special Master concluded that the Company's discharge of Rushing was not an unfair labor practice nor did it violate the decree of the Court of Appeals. [Pet. App. 36a, 48a, 49a]. The Court of Appeals concurred

[Pet. App. 2a, 4a]. Additionally, the Special Master concluded that the pressers who walked out to protest the lawful discharge of Rushing were not engaged in a protected concerted activity, and, therefore, that the company did not violate Section 8(a)(1) or (3) of the Act or the decree of the Court of Appeals when it discharged them for refusing to return to work [Pet. App. 38a, 49a]. On the other hand, the June 24, 1970, letter of the Company offering reinstatement to all pressers except Rushing was found by the Special Master and the Court of Appeals to be a valid offer of reinstatment; and, therefore, no unfair labor practice or violation of the decree of the Court of Appeals occurred in connection with the Company's treatment of the Decaturville pressers [Pet. App. 2a, 3a, 49a].

After the picketing commenced at Decaturville, on orders of the Union, it spread on July 15, 1970, to the other Company plants at Hartsville, Tennessee, Westmoreland, Tennessee, Loris and Aynor, South Carolina, and Frisco City, Alabama [Pet. App. 42a, 44a].

Having heard the evidence, the Special Master concluded that the National Labor Relations Board failed to establish by clear and convincing evidence that the picketing at Loris or Frisco was to protest unfair labor practices [Pet. App. 73a]. Since the strikers at both Loris and Frisco were economic strikers, the Special Master concluded that the Company did not violate the Act nor the decree of the Court of Appeals when the employees were not immediately reinstated upon their request to return to work [Pet. App. 73a]. The Court of Appeals adopted this conclusion [Pet. App. 3a].

ARGUMENT

The Court of Appeals Applied the Correct Standard in Reviewing the Findings, Conclusions, and Recommendations of the Special Master and Correctly Determined That the Company Was Not Shown by Clear and Convincing Evidence to Have Violated Its Decree; Accordingly, the Writ Should Be Denied.

The Court of Appeals held:

> "To hold Respondents in civil contempt we must find clear and convincing evidence in the record which proves that Respondents have violated a judgment of this Court. *NLRB v. Lynair, Inc.*, 380 F.2d 286 (6th Cir. 1967), *NLRB v. Local 5881, United Mine Workers of America*, 323 F.2d 853 (6th Cir. 1963)."
>
> "A review of the record of this case, including the exceptions to the Special Master's report, and the briefs filed in support of those exceptions fails to convince this Court that the Special Master's findings which were based on two years of fact finding were clearly erroneous." [Pet. App. 3a].

The reason assigned by the Solicitor General for this Court to grant the writ is an asserted conflict between the quoted test of the Court of Appeals and the test of this Court enunciated in *NLRB v. Warren Co.*, 350 U.S. 107 (1955).

The Special Master concluded that "employee Nelson Rushing was insubordinate and, accordingly, was discharged for just cause . . ." [Pet. App. 48a]. He also concluded that "the remaining pressers were not justified in their demands that Rushing be reinstated or rehired by plant manager Anderson on June 23, 1970, before they would return to work. These pressers were not discharged by the Company unreasonably under the

circumstances, . . ." [Pet. App. 49a]. In overruling the objections of the National Labor Relations Board to these findings and conclusions of the Special Master, the Court of Appeals stated emphatically that the mere mentioning by the Special Master of impermissible motives as having possibly played some role in the dismissal of Rushing and the pressers "hardly rises to the level of clear and convincing evidence of impermissible dismissals justifying a finding of civil contempt." [Pet. App. 4a]. It is at this point in the Court of Appeals' opinion that the language appears which the Board finds so abhorent:

> "A contempt proceeding is a setting very different from a normal proceeding for the enforcement of a Board order. The burden imposed by the clear and convincing evidence standard is heavy. The Board has *failed* to demonstrate that the Special Master erred in his finding or conclusions." [Pet. App. 4a]. (Emphasis supplied).

We submit that the test utilized by the Court of Appeals is entirely consistent with the decision of this Court in *Warren Co.* Of course, *Warren Co.* does not stand alone but must be taken in the context of its factual setting. There the employer failed to bargain with the Union since it demanded proof that the Union continued to represent a majority of the employees in the bargaining unit. This demand for proof of majority status came after the Board had determined such majority existed, and the Court of Appeals had enforced a bargaining order of the Board. Then, the Board filed a petition in the Court of Appeals, specifically setting forth the conduct of the employer in failing and refusing to comply with the Court's decree and asking that the employer be required to show cause why it should not be held in contempt. In its answer to the contempt petition, the employer admitted: (1) that there was sufficient evidence, even though disputed, to support the Board's order; and (2) that it had refused to bargain with the Union because of a loss in majority status due to a turnover in personnel.

Having made these two admissions before the Court of Appeals, the question for decision was limited to one issue: whether an employer who has been found guilty by the Board of unfair labor practices in refusing to bargain with a union "designated as the exclusive representative of its employees and who has been directed to so bargain, is, after a decree enforcing the order and without remedying its unfair labor practices, legally justified in refusing to bargain with the Union because it contends the Union does not in fact have majority status in its plant, or must such employer bargain fairly for a reasonable length of time in accordance with the order to avoid an adjudication in civil contempt." 350 U.S. at 112. This Court held in *Warren Co.* that under such circumstances, an employer cannot lawfully refuse to bargain; that he must do so for a reasonable time; and that a failure to do so invokes a statutory duty on the part of the Court of Appeals, on petition of the Board, to adjudicate the employer in contempt of its decree. While the Board is correct in asserting that the National Labor Relations Act contemplates "cooperation" between the Board and the Court of Appeals both at the enforcement and contempt stages in order to effectuate its purposes, we submit that the Board is clearly wrong in assuming that the Courts of Appeal were meant to be a statutory rubber stamp for what the Board conceives to be a violation of the Court's decree. We suggest that this is truly the issue here as the Board is clearly attempting to limit the authority of the Court of Appeals to review its own decree and to determine whether or not a violation of the decree has occurred.

This Court has made it clear that the granting or withholding of remedial action is not wholly discretionary with the Courts of Appeal in certain instances. The facts presented in *Warren Co.* are an example of one of these situations. In *Union Tool Co. v. Wilson,* 259 U.S. 107 (1922), cited in footnote 6 of this Court's opinion in *Warren Co.*, Mr. Justice Brandeis, discussing the scope of remedial orders in contempt proceedings, observed:

> "But the fact that a remedial order was entered in a contempt proceeding is not, in itself, a reason why it should not be subject to correction by an appellate court. . . . In the determination of the question whether an injunction has been violated, and, if so, whether compensation shall be made to the injured party, there may be occasion for the exercise of judicial discretion; but the order to be entered in such a proceeding is not exclusively or necessarily a discretionary one. . . . Moreover, legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts." 259 U.S. at 112.

An objective reading of the decision of the Court of Appeals here will clearly indicate that the Court of Appeals did not abuse its discretion in withholding remedial action. In fact, the Court of Appeals acted in complete conformity with the rationale of *Warren Co.* Here, the Court of Appeals did not refuse to extend well-settled principles of law to a conceded state of facts. In *Warren Co.* the employer in its answer to the petition for contempt alleged:

> "As shown hereinbefore and hereinafter Respondent has refused to bargain collectively with the Union because it did not represent a majority of the employees." 35 U.S. at 111.

Thus, there was not question of fact to be resolved in *Warren Co.* and the only issue presented to the Court was what remedy should be ordered to redress an admitted violation of the decree. Here after two years of fact finding, the Special Master found the facts adverse to the National Labor Relations Board and the Board was unable to convince the Court of Appeals on objections to the Special Master's report that the findings of fact were clearly erroneous. The National Labor Relations Board seeks to treat the present case as a conceded set of facts to

which it would apply well-settled rules of law; however, we submit that this is obviously not the case since the Court of Appeals properly applied the clearly erroneous rule to facts that were found adversely to the Board so as to make a determination of whether or not its decree had in fact been violated.

Contrary to the assertions of the Solicitor General, the denial of the contempt sanction by the Court of Appeals here does not subvert the enforcement of the National Labor Relations Act. What the Special Master's findings and the Court of Appeals decision clearly reflect is the total failure by the Board to sustain its burden of proof where and when it counted, before the Special Master. That the Company may have had dominant motives, mixed motives, equal motives, concurrent motives, or a bewildering combination of these is not the important or critical issue since it must be remembered that the act itself prohibits discrimination, and that the focus of dominant motivation is only a test to reveal whether discrimination has in fact occurred. *NLRB v. Whitfield Pickle Co.*, 374 F.2d 576 (5th Cir. 1967); *NLRB v. Adam Loos Boiler Works Co.*, 435 F.2d 707 (6th Cir. 1970). While it may not be necessary for the Board to show dominant motives, it is necessary for the Board to show some motive and the Court of Appeals simply determined that the Board had failed to offer clear and convincing evidence that the discharge of Rushing and the other pressers was unlawful or justified a finding of civil contempt [Pet. App. 4a]. The Board apparently suggests that the existence of a previous anti-union animous is sufficient and that a Court of Appeals should blindly confirm the Board's conclusion of a violation of the Court of Appeals decree. Such a test, we submit, is clearly not the standard enunciated by this Court in *Warren Co.* and is clearly not a standard consistent with the policies of the National Labor Relations Act.

CONCLUSION

For the reasons assigned, the Company respectfully urges that the writ be denied.

Respectfully submitted

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